FILED

931691 FEB 24 1994

OFFICE OF THE CLERK

No. _____

In the

SUPREME COURT of the UNITED STATES

October Term, 1993

Monroe Maness

Petitioner,

v.

Star-Kist Foods, Inc.;
H.J. Heinz Company, Inc.;
Matkov, Griffin, Parsons, Salzman
& Maddoff; Keith C. Hult;
James J. Salzman; Ray McCabe;
Alan D. Dierdorff; and
Larry Burke,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Patrick M. Connor
Counsel of Record
PETERSON, CONNOR AND SATRE
700 Lumber Exchange Building
Minneapolis, Minnesota 55402

Attorney for Petitioner

February 22, 1994

126 PP

QUESTIONS PRESENTED

The District Court ruled that an employer high level decision maker, could terminate a lower level employee, for failing to attend a meeting called by an attorney representing the employer in a Title VII case. The terminated employee did not know of the meeting because his personal attorney was on vacation at the time the notice arrived and no one informed the employee of the requested meeting. There was evidence that the outside attorney did not fully inform the decision maker of all the relevant facts concerning the employee but the District Court ruled that the decision maker did not act with retaliatory intent.

PARTIES TO THE PROCEEDING

Petitioner is Monroe Maness, a former employee of Respondent Star-Kist Foods, Inc. Ray McCabe, Alan D. Dierdorff and Larry Burke were Star-Kist management personnel in the chain of command above Maness. Matkov, Griffin, Parsons, Salzman & Maddoff was a law firm Star-Kist hired to defend itself against a sex harassment claim brought by another former Star-Kist employee. Keith C. Hult and James J. Salzman were attorneys at law associated with the Matkov firm.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

THE PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT
1. Preliminary Statement 3
2. Argument
I. Facts 4
II. Issue Discussion
1. Does Title VII protect an employee witness from termination who has asserted a right of counsel and but for the protected activity and conduct of counsel, the employee would not have been terminated? 10

2. Should the decision maker be imputed with the discriminatory (retaliatory) animus of the corporation's agent, outside attorney? 18

TABLE OF AUTHORITIES

Benson v. Little Rock Hilton Inn, 742 F. 2d 414, 417 (8th Cir. 1984).

Daines v. City of Mankato, 754 F. Supp. 681 (D. Minn. 1990).

Jack v. Texaco Research Center, 743 F.2d. 1129, 1131 (5th Cir. 1984)

Jiles v. Ingram 944 F.2d 409, at 413, (8th Cir. 1991)

Johnston v. Harris County Flood Control District, 869 F.2d 1565, 1571 (5th Cir. 1989)

Kientzy v. McDonnel Douglas Corp. 990 F.2d 1051 (8th Cir. 1993)

Shager v. Upjohn Co. 913 F.2d 398, 405 (7th Cir. 1990)

Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980)

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eight Circuit is reported at 7 F.3d 704 (8th Cir. 1993). The memorandum order of the United States District Court for the District of Minnesota is reprinted in the appendix hereto, intra.

JURISDICTION

The Order of the Court of Appeals was entered October 7, 1993 and Judgment was docketed on January 5, 1994. A petition for rehearing was denied on November 26, 1993. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §1254 (1).

STATUTE INVOLVED

42 U.S.C. §2000e (Title VII) and Minn. Stat. 363 et seq. (Minnesota Human Rights Act).

STATEMENT OF THE CASE

Plaintiff/Petitioner Monroe Maness (Hereinafter "Maness") was terminated because he was a witness against his own company in a sexual harassment litigation. He was terminated for allegedly failing to meet with the company's outside attorneys in that litigation. Maness brought a wrongful discharge claim under Title VII against his former employer and its outside attorneys.

Respondents are as follows: Star-Kist Foods, Inc. was the employer. Ray McCabe, Alan D. Dierdorff and Larry Burke were management personnel in the chain of command above Maness. Matkov, Griffin,

Parsons, Salzman & Maddoff was the outside, Chicago law firm Star-Kist hired to defend itself against a sex harassment claim brought by a former Star-Kist manager, Alice Ellenburg. (Maness was listed as a key witness supporting Ellenburg's allegations against Star-Kist). Keith C. Hult and James J. Salzman were attorneys at law associated with the Matkov firm and the two attorneys primarily assigned to defend Star-Kist against the Ellenburg claims.

REASONS FOR GRANTING THE WRIT

1. PRELIMINARY STATEMENT

This matter was tried before the Honorable Richard Kyle, District of Minnesota. On September 11, 1992, Findings of Fact, Conclusions of Law and Order for Judgment were entered finding no liability against the defendants. This

decision was appealed to the 8th Circuit Court of Appeals and upheld on October 7, 1993. A petition for rehearing was denied on November 26, 1993. Judgment of the Court of Appeals was entered on January 5, 1994.

2. ARGUMENT

I. FACTS

Maness commenced his employment with Star-Kist in 1973, in Perham, Minnesota. Star-Kist is headquartered in California but has several plants in the Midwest. For the twelve years Maness was employed as a manager for Star-Kist. He received good or above-average performance evaluations. He was a dedicated, faithful employee.

A close friend and co-worker, Alice Ellenberg, filed a charge of sex discrimination with the EEOC in March of 1981. She later filed two sexual

harassment charges and was then terminated on January 27, 1982 on grounds of "insubordination".

Maness had first hand knowledge of the events constituting Ellenberg's charges. Maness wrote three letters to the EEOC in support of Ellenberg. Maness believed that sending the letters to the EEOC would help fix the situation at the plant. Maness's name was mentioned in a fact finding conference at the EEOC. Representatives of Star-Kist from California attended that conference. Maness gave a lengthy statement to Ellenberg's attorney in Duluth. Ellenberg filed suit in Federal Court in Minnesota in March of 1983.

Following Maness's protected activity as a witness on behalf of Ellenberg, Maness experienced changes in his working conditions at the Tuffy's facility. In

March 1983, Maness was approached by the plant manager about a transfer to Muscatine, Iowa. A month later he was transferred.

Attorneys from the Matkov firm interviewed Maness in Muscatine on two separate occasions. In July 1983, James Salzman met with Maness at Maness's home. Salzman did not tell Maness that the meeting was confidential. In July 1984, Keith Hult conducted a three to four hour meeting with Maness at the Muscatine plant. Ray McCabe from Star-Kist's headquarters in California, also attended the meeting. Hult did not tell Maness the meeting was to be kept confidential.

Maness was subpoenaed for his deposition in the Ellenberg matter in August of 1984. Hult telephoned Maness twice about the deposition and to request a third meeting with Maness. In the

second telephone conversation, Maness stated he wanted to obtain his own attorney.

Maness engaged Charles Traw, of Iowa City, to act as his attorney. Maness told Traw that he would do whatever Traw believed he was morally or legally obligated to do. Traw telephoned Hult and informed Hult that all further contacts with Maness were to be directed through Traw.

The Ellenburg litigation stalled in the fall of 1984. Based on the three day deposition of Maness, Magistrate Boline ruled that the attorney-client privilege had attached to a few portions of the meetings between Maness and Star-Kist's attorneys. Both sides appealed to the District Court Judge. Nothing happened until the Judge ruled on those appeals in June of 1985, nine months later.

Hult then attempted to again arrange a meeting with Maness, through Traw. Hult sent a letter dated July 22, 1985 to Traw requesting Traw to contact Hult by July 30, 1985. Traw's office received the letter on July 25, 1985 while Traw was on vacation. None of Traw's associates acted on the letter or informed Maness of the letter. On July 31, 1985, Hult hastily sent a letter by Federal Express to Star-Kist in California indicating the lack of a meeting supported an assumption that "plaintiff's (Ellenburg's) attorney has received information concerning our trial strategy and our settlement posture." Hult also stated that California management could "assume" that Maness had refused to arrange a meeting.

Based solely on the information sent to Star-Kist by Hult regarding Maness's failure to meet with Hult, Star-Kist Vice

President Brian Leamy in California decided to terminate Maness. A memorandum of termination was prepared and faxed to Muscatine that same day, August 1, 1985. Maness, was immediately terminated for missing a meeting he knew nothing about.

Traw returned from vacation and attempted to have Maness reinstated by informing Hult that Maness did not know about the proposed meeting. Hult drafted another letter to Leamy and based on this letter Leamy decided not to reinstate Maness. Leamy concluded that Maness's actions reflected an unwillingness to meet about possible disclosure of confidential information.

Distraught over the firing of Maness, Alice Ellenberg decided to settle her litigation because she was concerned about the jobs of other employee\witnesses should they testify on her behalf.

II. ISSUES DISCUSSION

FIRST ISSUE

> Does Title VII protect an employee witness from termination who has asserted a right of counsel and but for the protected activity and conduct of counsel, the employee would not have been terminated?

Before the Maness decision, the second stage of the McDonnel-Douglas test required an employer to produce evidence of a legitimate, non-retaliatory reason for its conduct. Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980). In determining whether Star-Kist met its burden of production in retaliation cases, the Eighth Circuit had defined a clear statement: whether the "stated reason" is independent of the protected activity. Womack at 129.

In the instant case, the Eighth Circuit concludes that Maness "was dismissed for refusing to discuss the

extent to which he disclosed potentially privileged information to Louisell, not for expressing his personal views of Ellenberg's case." Maness v. Star-Kist Foods, Inc., 7 F.3d 704, at 708 (8th Cir. 1993). This interpretation ignores the simple truth that Maness was fired for failing to meet and the meeting was not independent of his protected activity. But for the communications to counsel in the underlying case, Hult had no desire to have a meeting to discuss alleged breaches. But for the communications in the underlying case, Maness would not have had to accede or not accede to the request to meet with Hult. But for the communications in the underlying case, there would have been no request for a meeting and no alleged refusal to meet.

The Fifth Circuit applies the "But For" test to protect employee witnesses in

a Title VII litigation. In Johnston v. Harris County Flood Control District, 869 F.2d 1565, 1571 (5th Cir. 1989) citing Jack v. Texaco Research Center, 743 F.2d. 1129, 1131 (5th Cir. 1984) the Fifth Circuit stated:

> Ultimately, the employee must prove that there was a causal connection between the protected activity and the adverse employment decision. The connection required is causation-in-fact or "but for" causation. Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that "but for" the protected activity she would not have been subjected to the action of which she claims.

Maness was fired because he missed a meeting called by an attorney defending the employer in a Title VII litigation, a meeting Maness knew nothing about. But for his protected activity, the defense attorney would not have called the meeting with Maness. But for asserting his right to have his own counsel, Maness would have

known about the meeting, would have attended the meeting and would not have been terminated.

After repeated questioning, any adverse witness still employed by an employer defending itself in a Title VII matter will seek personal, legal advice from the Plaintiff's attorney concerning the risks of providing evidence and testimony. A Plaintiff's attorney will properly tell the witness the attorney does not represent the witness and can not offer any advice. Under Maness, it would be malpractice for Plaintiff's attorney to suggest that Title VII will protect a witness from retaliation if the witness offers evidence or testimony unfriendly to the employer.

Under Maness, a witness still employed by the defendant employer does not have a First Amendment right of free

expression to provide oral or written statements to the Plaintiff's attorney. A witness does not have the right to travel to another jurisdiction and risk being subpoenaed in that jurisdiction. Under Maness, there is no longer any common law or constitutional right of the witness to be represented by his own personal attorney.

Maness was fired for failing to meet with the employer's attorneys for what would have been the fourth time.[1] The employer's attorneys knew from the beginning when Maness handed them a written statement, that Maness was an unfriendly witness to the employer in the Ellenberg litigation. It is unlikely that any reasonable attorney would convey

---

[1] Maness met with Salzman in 1983, with Hult in 1984 and was deposed for over three days by Hult and Louisell in 1984.

"trial strategy and our settlement posture" to an unfriendly witness and so there was questionable justification for this fourth meeting. Until the decision in Maness, it was not clear that Maness even had a duty to meet with the employer's attorneys for the fourth time.

Until Maness, the witness could consider hiring a personal attorney to obtain advice on the risks. Maness will have a chilling effect on that decision to obtain personal representation. The result in Maness necessitates that the witness rely exclusively on the advice of the employer's attorney.

The typical attorney hired to represent a client will inform any other attorneys in the case to communicate only with the new attorney. Indeed, any other attorney is ethically obligated to only contact the attorney of any person known

to be represented by an attorney.[2] Under Maness, the personal attorney of a Title VII witness would be committing malpractice unless the rule on contacting the witness was expressly waived. The personal attorney must insist that the employer's attorney continue to contact the witness/client directly, and specifically inform the witness/client of any meetings scheduled concerning the Title VII litigation.

In Maness, the personal attorney, Traw, made the mistake of drafting a standard representation letter and notifying the other attorneys to henceforth communicate only with Traw.

---

[2] In Minnesota Rule 4.2 states: "... a lawyer shall not communicate about the subject of representation with a party known to be represented by another lawyer in the matter, ...".

Maness was fired for failing to attend a meeting Maness did not know was requested. Attorney Traw received the written request for the meeting when Traw was on vacation and no one informed Maness of the meeting, including any one at the employer. Traw should not have restricted communication to Maness. Under the reasoning of Maness, Traw should have informed the employer that Maness expressly waived the ethical rule and that Maness must receive all communications directly.

Unless Maness is overruled, an attorney contacted to represent a witness in a Title VII matter must conduct the legal representation in a manner far different than any other representation. To avoid confusion among the bar, Maness should be overruled.

SECOND ISSUE

> Should the decision maker be imputed with the discriminatory (retaliatory) animus of the corporation's agent, outside attorney?

Although Maness has been held to have imputed knowledge of his attorney's receipt of a letter requesting a meeting (knowledge even the attorney did not have), the Eight Circuit has not addressed the issue of whether Vice President Leamy, acting for Star-Kist, should have imputed the knowledge and discriminatory (retaliatory) animus of their attorney, Hult.

The 8th Circuit recently in Kientzy v. McDonnel Douglas Corp. 990 F.2d 1051 (8th Cir. 1993) (opinion written by John R. Gibson) reviewed numerous cases which have held that supposedly neutral decision makers cannot insulate the employer from

wrongful discharge conduct. Judge Gibson quoted from Jiles v. Ingram 944 F.2d 409, at 413, (8th Cir. 1991) that the "evidence of intentional discrimination by lesser officials who initiated the discharge proceeding" was sufficient to find the employer guilty of disparate treatment. Hult initiated the discharge of Maness and the Trial Court found that Hult's behavior was "unwarranted and inappropriate".

The Seventh Circuit in Shager v. Upjohn Co. 913 F.2d 398, 405 (7th Cir. 1990) (also quoted by Judge Gibson in Kientzy at 1057), when a supposedly neutral decision maker "acted as the conduit of (a supervisor's) prejudice--his cat's paw--the innocence of its members would not spare the company from liability." Leamy may indeed have been unaware of the animus Hult had toward Maness and Ellenberg's attorney, Louisell.

Nevertheless, the Trial Court and the Eighth Circuit can not ignore that Leamy became Hult's "cat's paw" in the retaliation against Maness.

The Vice-President of Star-Kist, Leamy, relied solely on information from attorney Hult in his decision to terminate Maness. Hult was less than complete in his disclosures to Leamy. Hult told Star-Kist he believed Maness had communicated "information concerning our trial strategy and our settlement posture."

Star-Kist relied on recommendations tainted by Hult and hostile to Maness. Hult manipulated a scenario to have Maness terminated. This information known to Hult should be imputed to Leamy when the decision to terminate Maness was made. A termination based on this information is clearly retaliatory. After Maness was fired on August 1, 1985, Ellenberg decided

to pursue settlement of her litigation because she was concerned about the status of other witnesses' jobs should they testify on her behalf. As an attorney, Hult's goal was to bring about a successful resolution of the Ellenberg case. One method to attain that goal was to be excessively aggressive in his attempts to control employee witnesses. Hult also distorted his communications with senior management regarding the key witness, Maness. This resulted in Maness being terminated on the pretext of missing a meeting he knew nothing about. Hult successfully resolved the Ellenberg case because Ellenberg settled her case after Maness was terminated.

Ironically, in effect, the Eighth Circuit and the Trial Court have imputed to Maness information known only to his attorney Traw. Even more, Maness has been

held responsible for the information about a deadline for a meeting that even his attorney, who was on vacation, did not know about. Maness, the principal, is imputed with knowledge his agent did not even know. Star-Kist should be held to the same standard. The information and knowledge known to Hult should be imputed to Star-Kist.

There is no basis in Star-Kist's stated reason for terminating Maness, i.e., "failure to meet with the attorney." Under normal circumstances, reasonably prudent senior management would not terminate a long term, loyal, productive, middle manager for missing a meeting he knew nothing about. Brian Leamy terminated Maness without even talking to him first. Leamy claims he knew nothing more than what Hult told him. Leamy did not investigate Hult's information. Leamy

did not even ask Hult for more details. "Leamy did not ask Hult to describe or list the supposed confidences Hult allegedly told to Maness, nor did Hult ever indicate to Leamy that he had disclosed confidential information to Maness."

When Maness decided to retain Traw as his own attorney, Hult looked bad. It is unusual for a manager of a client to hire an attorney to handle future communications from the client's own attorney. Likewise, it is also unusual for a manager to be so honest that he would risk his own long term employment assisting a fellow employee in litigation against their company. Hult's retaliatory motive to terminate Maness for cooperating with Ellenberg's discrimination complaint should be imputed to his principal-Star-Kist. Terminating Maness for his

cooperation with Ellenberg is straightforward retaliation.

The ultimate question in retaliation cases is whether the Respondents were motivated by a desire to retaliate. It is enough if retaliation was one of the motives for termination. Benson v. Little Rock Hilton Inn, 742 F. 2d 414, 417 (8th Cir. 1984). The Eighth Circuit Opinion taken as a whole shows that an impermissible retaliatory motive played a part in the adverse employment action taken by Star-Kist against Maness. Daines v. City of Mankato, 754 F. Supp. 681 (D. Minn. 1990). In this case, retaliation against Maness was unquestionably one of the reasons for terminating Maness.

The decision of the Eighth Circuit should be overruled.

Respectfully Submitted.

PETERSON, CONNOR & SATRE

Patrick M. Connor
700 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 344-1221

March 30, 1994 (Rev.)

APPENDIX

Unites States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3393

Monroe Maness,

Appellant,

v.

Star-Kist Foods, Inc.; H.J. Heinz Company, Inc.; Motkov Griffin, Parsons, Salzman & Madoff; Keith C. Hult; James J. Salzman; Ray McCabe; Alan D. Dierdorff; Larry Burke,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

---

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 26, 1993

Order Entered at the Direction of the Court:

ss\ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 92-3393

Monroe Maness,

Appellant,

v.

Star-Kist Foods, Inc.; H.J. Heinz Company, Inc.; Motkov Griffin, Parsons, Salzman & Madoff; Keith C. Hult; James J. Salzman; Ray McCabe; Alan D. Dierdorff; Larry Burke,

Appellees.

Appeal from the United States District Court for the District of Minnesota

---

Submitted: June 17, 1993

File: October 7, 1993

Before JOHN R. GIBSON, Circuit Judge, ROSS, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Monroe Maness appeals from a judgment entered against him on his claim against Star-Kist Foods, Inc. and H.J. Heinz Company, Inc., the parent company of Star-Kist, that he was discharged in retaliation for participating in a sexual discrimination lawsuit of another Star-Kist employee in violation of Title VII, 42 U.S.C. § 363.03 subd. 7 (1985). He also appeals the entry of summary judgment on his claim against the law firm of Motkov, Griffin, Parsons, Salzman, and Madoff, and individual members of that law firm, who where counsel for Star-Kist in the related sexual discrimination litigation. He argues that but for his participation in protected activity, Star-Kist would not have requested a meeting with him, that Star-Kist's ignorance of its lawyer's act does not immunize it from liability, and that the lawyer's conduct is imputable to Star-Kist. He also argues that the district court erred in an earlier order in granting summary judgment on the tortious interference claim as it

applies to at-will employment. We affirm the judgment of the district court.[1]

Star-Kist hired Maness in 1973 as a production superintendent in the Tuffy's division pet food plant in Perham, Minnesota. In March 1981 he encouraged and assisted a friend and co-worker, Alice Ellenberg, in filing charges of sex discrimination and discrimination in pay against Star-Kist with the Equal Opportunity Employment commission. Maness wrote three letters to the EEOC on her behalf. He subsequently helped her draft another charge, in which she claimed that Star-Kist dismissed her in retaliation for filing the earlier charges. After Ellenberg filed suit against Star-Kist, Maness gave a statement to her lawyer, Barbara Louisell, about her work situation. Louisell listed Maness as a witness for Ellenberg's trial.

Star-Kist retained the Motkov law

---

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

firm in May 1983 to represent it in the Ellenberg case. A partner of the firm, James Salzman, assigned responsibility for defense of the case to Keith Hult, an associate in the firm. In July 1983 Salzman interviewed Maness about the Ellenberg case, and during this meeting Maness gave Salzman a copy of the statement that he had previously given to Louisell. On July 29, 1984, the plant manager, Alan Dierdorff, requested that Maness meet with Hult to discuss the Ellenberg case. Dierdorff, and another Star-Kist official, Ray McCabe, attended the meeting, but did not actively participate in it. Maness told Hult that he would not voluntarily testify in the Ellenberg case. Hult never told Maness not to testify for Ellenberg. Maness later changed his mind about testifying for Ellenberg, and he was served with a subpoena to testify in her case while he was in Minnesota on a family matter. Shortly thereafter, Hult called Maness to ask him about the subpoena, and Maness refused to speak to him. Hult requested a meeting, but Maness refused.

On September 5, 1984, Hult called Maness to discuss Maness' upcoming deposition. Hult told Maness that he wanted to meet with him to discuss allegations that Maness had disclosed information to Louisell that Hult believed was covered by the attorney-client privilege. Maness refused to talk to Hult. Hult sent Maness a letter that same day insisting that they meet on September 12. Meanwhile, Maness hired a lawyer, Charles Traw. Traw called Hult and told him that Maness would not attend the September 12 meeting, and that Hult should make all further contacts through Traw. Hult told Traw that he wanted to meet with Maness, that Star-Kist's attorney-client privilege applied to Maness, and that as Star-Kist's employee Maness owed a duty of loyalty to Star-Kist. Hult sent a letter to Traw on September 14, explaining that he wanted to meet with Maness to discuss possible breaches of the attorney-client privilege. Traw did no respond to this letter.

Maness' deposition was taken on September 18, 19 and 20. Magistrate Judge

Boline had ordered that the parties take Maness' deposition in his courtroom. Judge Boline ordered Maness not to answer questions objected to on the ground of attorney-client privilege, and stated that after the parties completed the deposition he would preside while Maness answered those questions with no attorneys present. Judge Boline determined that he would review the deposition transcript and excise any portion protected by the attorney-client privilege. After the deposition, Judge Boline issued an order that the attorney-client privilege had attached to certain portions of the meetings between Maness and Star-Kist's attorneys. He gave Star-Kist's attorneys a copy of the in camera deposition transcript with privileged portion excised. Both sides appealed this order of the district court.

On June 19, 1985, Hult telephoned Traw to tell him that the district court affirmed Judge Boline's order. Hult again asked to meet with Maness to discuss possible breaches of the attorney-client privilege. Traw refused to agree to a

meeting between Hult and Maness, believing that the meeting was unnecessary because Hult had received the privileged portions of Maness' deposition.

On July 3, Hult telephoned Traw again requesting a meeting with Maness. Traw assured Hult that he would contact him after he met with Maness on July 10, but Traw never contacted Hult. On July 22, Hult sent another letter to Traw demanding a meeting by July 30. This letter stated that if Traw did not contact Hult by that date, Hult would assume that Maness refused to discuss the "breaches of the attorney-client privilege," and Hult would notify Tuffy's of Maness' refusal. Traw's office received the letter on July 25, but Traw had left on vacation on July 19, and did not return until August 1. No one in Traw's office responded to Hult's July 22 letter or informed Maness of its contents.

On July 31, 1985, Hult reported to Heinz's general counsel and Star-Kist's personnel department of Traw's failure to respond by the July 30 deadline. Hult

wrote that he had been unable to set up a meeting with Maness through Traw, and that he assumed that "[Ellenberg's] attorney has received information concerning our trail strategy and our settlement posture." Based on Hult's report of Maness' failure to meet with him, Star-Kist's Vice President, Brian Leamy, fired Maness.

On August 1, 1985, Traw returned to his office, discovered Hult's July 22 letter, and learned from Maness of his termination. Traw contacted Hult, explaining that he did not know about the July 30 deadline, and stating that if Tuffy's reinstated Maness without loss of benefit or pay, Maness would meet with Hult. Leamy refused to reinstate Maness because he believed that Maness' actions reflected an unwillingness to meet about the possible disclosure of confidential information, that Maness breached his obligation to cooperate with Star-Kist, and that Maness was using Star-Kist's desire for a meeting as a tool to gain reinstatement.

In January 1986 Maness filed charges of discrimination with Iowa Civil Rights Commission and the Minnesota Department of Human Rights, and received a right to sue letter from the EEOC. Maness then filed suit against Star-Kist, Heinz, and Motkov Law firm, Hult and Salzman, and individual Star-Kist officials, alleging violations of the Minnesota Human Rights Act, Minn. Stat. § 363.03, conspiracy in violation of 42 U.S.C. § 1985 (1988), violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1988), and multiple pendent state law claims. Star-Kist, Heinz and the Motkov law firm filed a motion of summary judgment, and the district court[2] dismissed all of Maness' claims, except the claims of retaliation in violation of Title VII and the Minnesota Civil Right Act. Maness v. Star-Kist Foods, Inc., No. 6-87-523, slip. op. at 22 (D. Minn. Jan. 2, 1991). Maness appeals the dismissal of his tortious interference

---

[2] The Honorable Diana E. Murphy, Chief Judge, United States District Court for the District of Minnesota.

with contract claim.[3]

After a nine-day bench trial, the district court entered judgment for all defendants on Maness' retaliation claims. Maness v. Star-Kist Foods, Inc., No. 6-87-523, slip op. at 21 (D. Minn. Sept. 11, 1992). Using the Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), analysis,[4] the district court

---

[3] The district court dismissed Maness' claims of conspiracy under 42 U.S.C. § 1985, and RICO, 18 U.S.C. § 1961-1968, as well as claims of intentional infliction of emotional distress, extortion, wrongful discharge in violation of public policy, defamation, and breach of an implied covenant of good fail and fair dealing. Maness does not appeal the dismissal of these claims.

[4] Under the Burdine three-part analysis, once a plaintiff makes a prima facie showing of retaliation, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the dismissal. If the employee produced evidence other than retaliation, then plaintiff must show that the employer's proffered reason was actually a pretext for retaliation. Burdine, 450 U.S. at 253, 256; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1972); Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980).

found: (1) that Maness made a prima facie case of retaliatory discharge or reprisal for his protected acts under both Title VII and the Minnesota Human Relations Act, (2) that Star-Kist had established a legitimate and non-discriminatory reason for firing Maness, specifically, the failure to meet with Hult, and (3) that Maness failed to establish pretext. The court concluded that neither Star-Kist, nor its officials, McCabe, Dierdorff and Burke, participated in any intentional or otherwise actionable reprisal or other discrimination against Maness in violation of Title VII or the Minnesota Human Relations Act. Maness, slip op. at 20-21. Finally, the court found that the Motkov firm, Hult and Salzman, did not aid or abet any reprisal in violation of the Minnesota Human Relations Act. Maness appeals the district court's finding of a non-retaliatory reason for his discharge and the dismissal of the tortious interference claim.

I.

Maness first argues that the district court erred in dismissing his retaliation claims. He contends that the district

court's findings that Star-Kist had a legitimate, non-discriminatory reason for his discharge, and no retaliatory intent were clearly erroneous. He specifically attacks the district court's finding that his protected participation in the Ellenberg case was independent of Star-Kist's requests to discuss attorney-client communications arising from that lawsuit. The shortcoming of Maness' argument is that after a full trial on the issue of retaliation, the three-part Burdine analysis falls from the case, and the district court must only determine the ultimate issue: whether the employer retaliated against the employee for exercising his protected rights. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983). The Supreme Court recently affirmed this position in St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2753 (1993), holding that once an employer articulates a non-discriminatory purpose for termination, the three-part analysis drops from the case, and the district court must only decide whether the employer intentionally discriminated or retaliated

against the employee. As the thrust of the discussion of both parties relating to prima facie case, non-discriminatory reasons and pretext are immaterial at this stage, we consider these arguments only insofar as they may illuminate the general question of whether retaliation or discrimination has been established. See Aikens, 460 U.S. at 716 (ultimate issue of discrimination or retaliation is decided by considering all of the evidence of record); St. Mary's Honor Center, 113 S. Ct. 2748 (same).

The district court made an unequivocal finding that Star-Kist did not retaliate or discriminate against Maness, and that Maness was fired because he failed to meet with Star-Kist attorneys. Maness, slip op. at 33 (Sept. 11, 1992). These are factual findings that we may reverse only if clearly erroneous. Fed R. Civ. P. 52; St. Mary's Honor Center, 113 S. Ct. at 2756 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985)). When findings of fact are based on credibility of witnesses, great deference is given to the trial court's

determinations. Davis v. Lambert of Arkansas, Inc., 781 F.2d 658, 660 (8th Cir. 1986). If an employer proves that its reason for terminating an employee was independent of the employee's exercise of protected rights, the termination will be deemed non-retaliatory. Benson v. Little Rock Hilton Inn, 742 F.2d 414, 418 (8th Cir. 1984). Even if the protected conduct is a substantial element in the decision to terminate the employee, the employer will not be liable if the employee would have been discharged in the absence of the protected activity. Womack v. Munson, 619 F.2d 1292, 1297 (8th Cir. 1980), cert. denied, 450 U.S. 979 (1981).

Maness relies on Womack, where this court held that an employer unlawfully terminated an employee for expressing personal opinions about another lawsuit. There, the court concluded that Womack's discharge was "inextricably linked" to his protected rights in the underlying case, and thus retaliatory in nature. Womack, 619 F.2d at 1297. Maness' dismissal differs significantly from the Womack case. Here, the trial court specifically

concluded that Maness was fired because he refused to meet with Star-Kist attorneys, despite their many requests. The district court found that he was dismissed for refusing to discuss the extent to which he disclosed potentially privileged information to Louisell, not for expressing his personal views of Ellenberg's case. The district court's ruling that the reason for Maness' termination was sufficiently independent of the underlying Ellenberg case was not clearly erroneous.

Maness also argues that Star-Kist's failure to reinstate him proves retaliation. The district court rejected this contention, ruling that Leamy's decision was legitimately based on Hult's August 15 letter, which never mentioned the Ellenberg case except insofar as it involved Maness' possible breaches of Star-Kist's attorney-client privilege. Leamy testified that he believed Maness' refusal to meet for almost a year reflected an unwillingness to cooperate, which the trial court determined was a legitimate reason for termination. The

district court was in the best position to judge the credibility of the witnesses in this case, and we will not upset its conclusion that Maness' refusal to meet and cooperate with his employer was the cause of his termination, not his involvement in Ellenberg's litigation. See, e.g., Davis, 781 F.2d at 660 (evidence was sufficient to support a finding that employer's refusal to reconsider employment was not retaliatory); Benson, 742 F.2d at 418 (sufficient evidence supported trial court's finding that employer discharged employee for lying and stealing, reasons independent of her allegations in her discrimination suit against the employer). Thus, the district court's finding is not clearly erroneous.

II.

Maness also appeals the district court's order granting summary judgment against him on his claim for tortious interference with his employment contract. Maness contends that Hult tortiously interfered with his employment and thereby caused his termination. The district court dismissed the claim, concluding that

because Maness was an at-will employee, no employment contract existed and, accordingly, he was precluded from recovering for any intentional interference with contractual relations. Maness v. Star-Kist Foods, Inc., No. 6-87-523, slip op. at 22 n.16 (D. Minn. Dec. 31, 1990).

Subsequent to the district court's dismissal of Maness' claim, the Minnesota Supreme Court has concluded that a tortious interference claim may arise from an at-will employment agreement. See Nordling v. Northern States Power Co., 478 N.W.2d 498, 505 (Minn. 1991). Notwithstanding this development in the law, we still uphold the district court's dismissal of Maness' tortious interference claim based on other grounds. See Lane v. Peterson, 899 F.2d 737, 742 (8th Cir.), cert. denied, 498 U.S. 823 (1990) ("[W]e may affirm a judgment on any ground supported by the record even if not relied upon by the district court.").

In Minnesota, the plaintiff in a tortious interference with contract action

must prove: (1) the existence of a contract; (2) the alleged wrongdoer had knowledge of the contract; (3) an intentional procurement of a breach; (4) the alleged wrongdoer acted without justification; and (5) damages. Furley Sales and Assocs. v. North Am. Automotive Warehouse, Inc., 325 N.W.2d 20, 25 (Minn. 1982). Regardless of whether a contract existed, Maness offered no evidence that Hult intended to cause Maness' termination or that he did cause it, and therefore, the district court did not err in granting summary judgment. Hult's only role in Maness' termination was that of informing Leamy of Maness' refusal to meet. The district court concluded, and the correspondence between Hult and Leamy shows, that Hult never recommended that Leamy fire Maness.

In addition, and independent of Maness' failure to establish the required elements of a claim of intentional interference with contract, an attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of

his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain. McDonald v. Stewart, 182 N.W.2d 437, 440 (Minn. 1970); Schuler v. Meschke, 435 N.W.2d 156, 163-64 (Minn. Ct. App. 1989). Furthermore, in Minnesota, a corporation's officer, employee, or agent who acts with a good-faith belief that his actions are furthering the company's business is legally justified in interfering with another employee's employment contract. Nordling, 498 N.W.2d at 507. This defense is lost only when the agent acts with bad faith, personal ill-will, malice, or a deliberate intent to harm the employee. Id. The record reflects no evidence that Hult acted for personal gain or with ill-will toward Maness.[5] The district court did not err in entering summary judgment against Maness on his tortious interference with contract claim.

We affirm the judgment of the district court.

---

[5]We need not discuss the degree to which the attorneys' conduct created substantial legal difficulties in this litigation.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Monroe Maness,

Plaintiff,

vs.

Civil No. 6-87-523
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

Star-Kist Foods, Inc., H.J. Heinz Co., Inc., Matkov, Griffin, Parsons, Salzmann & Madoff, Keith C. Hult, James J. Salzmann, Ray McCabe, Alan D. Dierdorff and Larry Burke,

Defendants.

Robert Brenner and Patrick Connor, Minneapolis, Minnesota, for plaintiff Monroe Maness.

Edward M. Laine and Carol A. Ellingson, Oppenheimer, Wolff & Donnelly, St. Paul, Minnesota, for defendants Star-Kist, H.J. Heinz Co., Inc., Ray C. McCabe, Alan D. Dierdorff and Larry Burke.

Kirk O. Kolbo, Faegre & Benson, Minneapolis, Minnesota, for defendants Matkov, Griffin, Parsons, Salzmann & Madoff, James J. Salzmann and Keith C. Hult.

The above-entitled action came on for trial before the court on June 22-24, June 29 through July 1 and July 13-17, 1992. Based upon the evidence adduced at trial and upon all the files, records and proceedings herein, as well as the arguments of counsel, the court makes the following:

I. FINDINGS OF FACT

A. Parties

1. Plaintiff Monroe Maness is a citizen of the United States and resides in Rock Island, Illinois.

2. The Corporate Defendants

a. Defendant Star-Kist is a corporation incorporated under the laws of the State of California and has its corporate headquarters in Long Beach, California. At all times relevant to this lawsuit, Star-Kist was a wholly-owned subsidiary of defendant H.J. Heinz Co. ("Heinz"), and was authorized to do business under the laws of the States of Iowa and Minnesota.

b. Defendant Heinz is a corporation incorporated under the laws of the State of Pennsylvania and has its corporate headquarters in Pittsburgh,

Pennsylvania.

c. At all relevant times, defendant Alan D. Dierdorff was the Plant Manager of the Star-Kist facility in Muscatine, Iowa. At the time of trial, Dierdorff was retired from his employment at Star-Kist.

d. At all relevant times, defendant Ray C. McCabe was the General Manager Pet Food Manufacturing for Star-Kist. At the time of trial, Dierdorff was retired from his employment at Star-Kist.

e. At all relevant times, defendant Larry Burke was the Production Manager of the Star-Kist facility in Muscatine, Iowa. At the time of trial, Burke remained in the employ of Star-Kist, serving as the Regional Manager Manufacturing for the Western United States. Maness voluntarily dismissed his claims against defendant Burke at the conclusion of the case.

3. The Lawyer Defendants

a. At all relevant times, defendant Matkov, Griffin, Parsons, Salzmann & Madoff ("Matkov firm") was a law firm located in Chicago, Illinois.

b. At all relevant times,

defendant James Salzmann was a partner with the Matkov firm.

c. At all relevant times, defendant Keith Hult was an attorney with the Matkov firm. At the time of trial, Hult was a partner in the law firm of Wildman, Harold, Allen & Dixon, located in Chicago, Illinois.

B. Maness's Employment

4. Maness commenced his employment at Star-Kist on January 17, 1973, beginning work with the Tuffy's Division of Star-Kist and serving at the Tuffy's factory in Perham, Minnesota. Maness was hired as Tuffy's Night Superintendent, and remained in that position until April 1, 1983, when he transferred to the Star-Kist factory in Muscatine, Iowa. Maness was employed at the Muscatine factory from April 1983 to his termination on August 1, 1985. For the twelve years he was employed by Star-Kist, both at Perham and Muscatine, Maness received average or above-average performance evaluations. Maness was terminated on August 1, 1985. This action was commenced on July 29, 1985.

C. Ellenberg Litigation

5. While employed at Tuffy's, Maness became friends with Alice Ellenberg, a co-worker at Tuffy's. Between 1974 and January 1982, Ellenberg worked as a Supervisor in the Quality Control Department. Ellenberg and Maness worked on the same shift about 50% of the time and were friends away from the Tuffy's facility.

6. In March 1981, Ellenberg filed a charge of sex discrimination and discrimination in pay with the Equal Employment Opportunity Commission ("EEOC"). Later in March 1981, Ellenberg filed a second charge with the EEOC, alleging retaliation by certain management personnel at Tuffy's. In January 1982, Ellenberg filed a third charge with the EEOC, alleging discriminatory treatment by Tuffy's management. On January 27, 1982, Ellenberg was terminated by Tuffy's on grounds of insubordination.

7. Maness had first hand knowledge of some of the events constituting Ellenberg's charges of sexual harassment and retaliation, but Maness had no direct knowledge of other charges, such as the pay discrimination charge.

8. Maness encouraged Ellenberg to file these charges with the EEOC and he wrote three letters to the EEOC supporting her charges. Maness sent the letters to the EEOC in part because he was concerned about the overall climate of and conditions at the plant. Maness believed that sending the letters to the EEOC would help fix the situation at the plant, not just resolve Ellenberg's problems. Maness spoke to Tuffy's management about Ellenberg's situation, including alleged acts of sexual harassment by supervisory personnel. Maness also addressed a "Plant Advisory Committee" about changes in Ellenberg's shift schedule which occurred following her filing of a charge. In addition, Maness spoke with Ellenberg about events that occurred at the plant, including inter alia, a critical performance review from Keith Johnson, Ellenberg's superior. Maness also gave Ellenberg a tape recorder for her use in recording a January 27, 1982 meeting between Ellenberg and Tuffy's senior management. Finally, Maness was listed in the EEOC's case file as being willing to offer evidence in favor of Ellenberg.

9. Following her termination, Ellenberg filed a fourth charge with the EEOC, alleging that she was terminated in retaliation for filing charges. Maness helped Ellenberg compose this fourth charge.

10. In May, 1982, a fact-finding conference was held with EEOC investigator Ken Barlow. The conference was attended by Ellenberg, representatives of Tuffy's and representatives of Star-Kist. Maness's name was mentioned during discussions about the January 27, 1982 meeting that resulted in Ellenberg's termination. It was divulged that had Ellenberg been allowed to have a witness at that meeting, Maness would have been her witness.

11. In February 1983, Ellenberg received a right-to-sue letter from the EEOC. By this time, Ellenberg had secured the services of Barbara Louisell, an attorney in Duluth, Minnesota. In March 1983, Maness travelled with Ellenberg to Duluth, Minnesota, where he gave a lengthy statement to Louisell about his knowledge of Ellenberg's work situation.

12. Ellenberg filed suite against

Tuffy's and Star-Kist in March 1983. The action was entitled Alice Ellenberg v. Tuffy's Division of Starkist Foods, et al., Civil File No. 4-84-883.

13. In the summer of 1984, Ellenberg divulged her witness list in preparation for a scheduled August 1984 trial. Maness was listed as a lay witness for Ellenberg. Maness was the only supervisory level employee at Tuffy's who was scheduled to testify on behalf of Ellenberg. In addition, Maness was listed as able to testify about numerous acts of harassment and discrimination, as well as the effects of the alleged discrimination on Ellenberg. Some of the alleged acts were witnessed by others and some were admitted by Tuffy's.

14. Maness was terminated on August 1, 1985. Thereafter, Ellenberg decided to pursue settlement of her litigation because she was concerned about the status of other witnesses' jobs should they testify on her behalf. The case was settled in 1987.

D. Transfer to Muscatine

15. Following Maness' involvement on behalf of Ellenberg, he experienced

changes in his working conditions at the Tuffy's facility. Maness was criticized for using a company copier for personal use in violation of Tuffy's policy. Maness did in fact use the copier, but that practice was wide-spread in the plant. Maness was also accused of providing an hourly worker with a pay schedule, a charge which Maness denied. In addition, Maness was told to stop selling Amway products in the plant, although he had been selling those products for many years and despite the fact that other Tuffy's employees continued to sell Amway products and other products. Finally, Maness applied for a promotion in the Perham facility and appeared for the interview with personnel from Star-Kist headquarters. Maness was never interviewed, despite his availability outside the interview room.

16. Sometime prior to Ellenberg's termination, Maness requested a temporary transfer to a Star-Kist facility overseas. He felt that some international experience would aid his opportunities at the Perham plant. No action was taken on his request at that time.

17. In March 1983, Plant Manager Bill Nelson approached Maness and told him that there was an opening at Star-Kist's facility in Muscatine, Iowa. This was the first time that Maness had been informed of a transfer opportunity within the company.

18. Maness voluntarily decided to pursue the Muscatine position. He flew to Iowa and drove to Muscatine for interviews with Star-Kist personnel at the Muscatine plant. Maness interviewed with Production Manager (and defendant) Larry Burke during the day and with Plant Manager (and defendant) Alan Dierdorff later that evening. Maness asked Dierdorff if "Brian Leamy [Star-Kist's Vice-President of Operations] was shoving me down his throat," referring to his involvement with the Ellenberg claim. Dierdorff responded by saying that events at the Perham plant were of no consequence to him and that Gary Schmitz, another former Perham employee with strong feelings about Ellenberg, was working at Muscatine. A few days later, Dierdorff called Maness and offered him the position of Production Foreman on the plant's second shift.

Maness accepted the offer and was told that he was to be in Muscatine within 30 days. Maness began his employment in Muscatine on April 1, 1983.

19. The Muscatine position involved fewer accountabilities than Maness had in Perham, but Maness would supervise more people and would have a higher rate of pay.

E. Maness's Contacts with Star-Kist's Lawyers

20. The Matkov firm was retained in late May 1983 to represent Star-Kist in the Ellenberg litigation. Salzmann was a partner in the Matkov firm and was responsible for securing the Ellenberg case. After securing the case, Salzmann assigned the matter to attorney Keith Hult, an associate in the firm. Hult had day-to-day control over decisions regarding the Ellenberg litigation and had final authority over litigation decision. In addition, Hult maintained almost all contact with Star-Kist personnel. Salzmann rarely had contact with Heinz or Star-Kist personnel regarding the Ellenberg litigation.

21. The Matkov firm focused its

practice on the areas of traditional labor law and employment law, including employment discrimination litigation. Hult had spent virtually his entire legal career practicing in the area of employment law and employment-related litigation, including employment discrimination under Title VII and state law.

22. In July 1983, Maness received a telephone call from Cynthia Pridy of Star-Kist's Personnel Department. Pridy asked Maness if he knew about the Ellenberg case and if he would consent to meet one of the attorneys retained by Star-Kist to represent it on the Ellenberg matter. Maness agreed to the meeting and offered to hold it at his home, in part to keep the Ellenberg matter separate from his job at the Muscatine facility. James Salzmann of the Matkov firm was the attorney with whom Maness met.

23. Salzmann conducted the meeting with Maness at Hult's request. Hult told Salzmann that they needed to meet with Maness, and Salzmann knew that Maness had been an employee at the Perham plant prior to working at Muscatine. Salzmann

conducted the meeting because he was in the Muscatine area on other matters.

24. The meeting took place at Maness' home in the afternoon hours of July 6, 1983.

25. Salzmann did not advise Maness that the meeting was voluntary, although Maness did not indicate that he was meeting under duress. In addition, Salzmann did not tell Maness that the meeting was confidential or that he could not discuss the substance of the meeting with others. Salzmann did tell Maness that Star-Kist expected his cooperation and that a "tank could be described as half full or half empty" depending on how a person characterized the facts. Salzmann made it clear that Maness was not expected to lie about any facts.

26. During the meeting, Maness gave Salzmann a copy of the statement Maness provided to Barbara Louisell in March 1983. Salzmann asked Maness if he had signed the statement, but did not otherwise refer to the statement during the meeting. Salzmann asked Maness questions about Ellenberg's home life and job performance, to which Maness provided

answers. Salzmann also asked Maness if he was in contact with Ellenberg or Louisell.

27. Salzmann did not tell Maness any confidential information, did not speak specifically of settlement strategy and did not expressly discuss trial strategy. Salzmann left the house when the meeting ended and thereafter turned all information from the meeting over to Hult. Maness did not discuss the Salzmann meeting with any o his superiors at the Muscatine plant.

28. On July 29, 1984, Maness received a phone call at home from the Muscatine plant, directing him to come to Dierdorff's office for a meeting with another lawyer who was representing Star-Kist on the Ellenberg litigation. When he arrived at Dierdorff's office, Maness learned that Dierdorff, Ray McCabe from Star-Kist's headquarters in California and attorney Keith Hult were waiting for him.

29. The meeting lasted between three and four hours. During that time, neither Dierdorff or McCabe spoke, except to exchange pleasantries. Dierdorff spent the time working on plant business and McCabe simply observed the interaction.

The meeting was not audio or video taped.

30. Maness can recall little of the substance of the meeting. Hult dominated the meeting and asked Maness a series of questions relating to the Ellenberg litigation. Hult did not inform Maness of any Upjohn privilege nor did he tell Maness that the topics covered in the meeting were to be kept confidential. Hult behaved in an aggressive and overbearing manner.

31. During the meeting, the subject of Maness being subpoenaed to testify in the pending Ellenberg litigation arose. Maness told Hult that he did not want to testify and that he had no reason to go to Minnesota. Hult told Maness that he believed that any subpoena sent from Minnesota to Iowa would be invalid. Hult did not threaten Maness' employment or tell him that he was not to testify for Ellenberg, or tell him that he was to stay out of Minnesota.

32. Following the meeting with Hult, Maness decided that he would not voluntarily testify for Ellenberg in Minnesota.

33. Subsequent to the meeting with

Hult, Maness told Burke that he had received a subpoena in the mail from Ellenberg's attorneys, but that he did not want to go to Minnesota to testify. Because Dierdorff was unavailable, Burke called McCabe at Star-Kist's headquarters in California, and advised McCabe that Maness did not want to go to Minnesota to testify. Pursuant to McCabe's instructions, Burke faxed McCabe a copy of the subpoena. McCabe eventually contacted Burke and informed him that the subpoena was invalid. Burke relayed this information to Maness. Maness was not called to testify pursuant to that subpoena.

34. On or about August 18, 1984, Maness' daughter requested that Maness come to Montevideo, Minnesota to assist her in a family crisis. Prior to taking the trip, Maness had advised attorney Louisell that he would not testify. He subsequently changed his mind after speaking with Louisell's father, who also was an attorney. Maness then traveled to Montevideo, where he was personally served with a subpoena to testify.

35. Maness called Burke to inform

him that he was in Minnesota visiting his daughter. Burke was not available and the message was left for Burke. The message was relayed to McCabe at Star-Kist's headquarters in California. Maness's "emergency leave" was not a violation of company policy, although his absence did cause some scheduling difficulties for Star-Kist.

36. Following Maness's return to Muscatine, Maness told Burke that he had been subpoenaed while he was in Minnesota. Burke told Maness that his voluntary trip to Minnesota and agreement to testify made Burke and McCabe look foolish. Burke also told Maness that "you may not be one of Ray McCabe's favorite people right now."

37. On August 28, 1984, Hult called Maness at the Muscatine plant, and asked questions about the subpoena Maness had received in Montevideo. Maness told Hult that he was frightened and that he did not want to continue the conversation. Hult then requested a meeting, but Maness would not agree to meet with him.

38. On September 5, 1984, Hult placed another telephone call to Maness at the Muscatine plant. During that

conversation, Hult questioned Maness about the affidavit that Maness had signed indicating that Maness wanted to have his deposition, scheduled for September 17 or 18, 1984, taken in Montevideo rather than Muscatine. Hult also told Maness that Hult wanted to meet with Maness prior to Maness's deposition, in part to discuss allegations that Maness had disclosed certain information that Hult believed was covered by attorney-client privilege. Maness told Hult that he did not want to continue the conversation and that he wanted to obtain legal advice. Hult did not object to Maness's desire to obtain legal representation.

39. Hult sent Maness a letter dated September 5, 1984, in which Hult insisted that he and Maness meet on September 12, 1984 to discuss "certain allegations concerning your employment" that were attributed to Maness by Louisell.

40. On September 7, 1984, Maness engaged Charles Traw of Iowa City, Iowa, to act as his attorney in dealing with Hult. Maness told Traw that he would do whatever Traw believed he was either morally or legally obligated to do. Traw

called Hult and informed him that Maness would not be attending any meeting on September 12. Hult informed Traw that Hult believed that the Upjohn privilege applied to Maness and that Maness owed a duty of loyalty to Star-Kist as a supervisor. Traw informed Hult that all further contacts with Maness were to be directed through Traw.

41. Hult responded to Traw's telephone call by letter dated September 12, 1984. Traw received this letter on September 18, 1984. Although the letter stated that Hult wanted to discuss possible breaches of the attorney-client privilege, Traw believed that Hult desired a meeting in order to review the testimony that Maness was likely to give at his upcoming deposition. Traw believed that the deposition had started prior to him receiving the letter and that as a result, the meeting was moot. Traw did not respond to Hult's written request for a meeting.

F. Maness Deposition

42. At a hearing before Magistrate Judge Floyd Boline on September 18, 1984, counsel in the Ellenberg litigation were

told that Maness's deposition would be taken in his courtroom and questions objected to on grounds of attorney-client privilege need not be answered. Instead, after the deposition had been concluded, Magistrate Judge Boline would preside while Maness answered those same questions without attorneys for either side being present. Magistrate Judge Boline determined that he would then review the deposition transcript and excise any portions determined to be protected by the attorney-client privilege. Louisell objected to this procedure and argued that she should be allowed to be present at all times. Her statements at that time indicated to Hult that Maness may have disclosed information that Hult believed was protected by the attorney-client privilege.

43. On September 18, 19 and 20, 1984, Maness's deposition was taken. Maness' deposition testimony revealed that Maness had spoken with Louisell about his meetings with Salzmann and Hult and had provided her with notes concerning those meetings.

44. Magistrate Judge Boline issued

an order in October 1984, determining that the attorney-client privilege had attached to certain portions of the meeting between Maness and Star-Kist's attorneys. The Magistrate Judge released to Star-Kist a copy of the in camera deposition transcript, but with the privileged portions excised out. Both sides appealed the ruling to United States District Judge Diana E. Murphy. In its appellate brief, Star-Kist attached as an exhibit a copy of the excised transcript, such copy containing the unexcised portion of the in camera deposition transcript.

45. During the pendency of Judge Murphy's review of the ruling, Hult informed Star-Kist that any efforts to discern the extent of Maness's alleged discussions with Louisell should be put on hold. That ruling was in large part affirmed by Judge Murphy in June 1985.

46. Following the deposition, Traw met with Maness and discussed a possible action against Star-Kist and the Matkov firm based upon Title VII; Maness did not express any interest in such litigation.

G. Maness's Termination

47. Hult contacted Traw by telephone

on June 19, 1985 and informed Traw of Judge Murphy's ruling. Traw requested a copy of the order.

48. On June 20, 1985, Hult sent Traw a copy of Judge Murphy's order, and again requested a meeting with Maness to discuss possible breaches of the attorney-client privilege. Upon reviewing page five of Judge Murphy's order, Traw concluded that no meeting was necessary, Traw believing that Hult had been given the portions of the in camera deposition transcript that had been found to be privileged.

49. Hult called Traw on or about July 3, 1985 and again requested a meeting with Maness. Traw stated that he was meeting with Maness on or about July 10, 1985 and would contact Hult after that meeting. Traw did not contact Hult on July 10, 1985 nor any time thereafter.

50. On July 22, 1985, Hult sent Traw a letter demanding a meeting by July 30, 1985. The letter stated that if Traw did not contact Hult by July 30, 1985 "we will assume that Mr. Maness has refused to meet with us regarding the attorney-client privilege and promptly convey that information to Tuffy's." Traw's office

received the letter on July 25, 1985. Traw left for vacation on July 19, 1985 and did not return until August 1, 1985. None of Traw's associates acted on the letter or informed Maness of the letter.

51. On July 31, 1985, Hult talked with Pridy and John Ciko, Heinz' general counsel about the fact that no response had been given by the July 30, 1985 deadline. In a July 31, 1985 letter to Pridy, Hult confirmed that he had been unable to set up a meeting with Maness through Traw. Hult also indicated that the lack of a meeting supported an assumption that "plaintiff's attorney has received information concerning our trial strategy and our settlement posture. Naturally, any attorney who comes into possession of such information gains a tremendous advantage." Hult also stated that they could "assume" that Maness had refused to arrange a meeting.

52. Based solely on the information sent to Star-Kist by Hult regarding Maness's failure to meet with Hult, Star-Kist Vice-President Brian Leamy decided to terminate Maness. A memorandum of termination was prepared and was sent to

Ray McCabe in Muscatine by facsimile transmission, with directions for McCabe to read the memorandum to Maness. McCabe, who was in Muscatine on other business, did so upon Maness's arrival at the plant. Maness was then escorted from the plant.

53. Traw returned to his office on August 1, 1985 and discovered the July 22, 1985 letter from Hult. Traw then talked to Maness, but it was after Maness had been terminated. Subsequently, Traw spoke with Hult by telephone and then sent Hult a letter detailing the fact that Traw had been away from the office, had not seen the July 22, 1985 letter and had no knowledge of the July 30, 1985 deadline contained therein. Traw's letter also stated that "if [Maness was] reinstated by Tuffy's without loss of benefit or pay, he would be willing to meet as requested in your correspondence of July 22, 1985."

54. Hult forwarded Traw's August 1, 1985 letter to Star-Kist and also spoke with Leamy. Leamy instructed Hult to set forth responses to each of the contentions raised in Traw's August 1, 1985 letter. Hult sent Leamy the letter on August 15, 1985. Hult indicated that he had no way

to verify Traw's statement that Maness was unaware of the deadline. Hult also indicated that he did not possess any portions of Maness's privileged deposition testimony and he could not obtain information he desired from the transcript.

55. After reviewing the letter from Hult, and discussing the situation with Ciko and Hult, Leamy decided not to reinstate Maness. Leamy concluded that Maness's actions reflected an unwillingness to meet about possible disclosure of confidential information. Leamy believed that Maness was obligated, as a supervisor, to meet and cooperate as requested. Leamy also concluded that he would not allow Maness to use Star-Kist's desire for a meeting as a tool to gain reinstatement. Leamy did not ask Hult to describe or list the supposed confidences Hult allegedly told to Maness, nor did Hult ever indicate to Leamy that he had disclosed confidential information to Maness. On August 19, 1985, Leamy told Hult to prepare a response to Traw's August 1, 1985 letter.

56. On August 22, 1985, Hult sent

Traw a letter detailing Leamy's decision not to reinstate Maness. Traw did not respond to Hult's letter.

57. Maness filed a charge of discrimination with the Iowa Civil Rights Commission on January 24, 1986.

58. Maness filed a charge with the Minnesota Department of Human Rights on May 28, 1986.

59. Maness received a "right to sue" letter from the EEOC on July 28, 1987.

60. Maness commenced this action on July 29, 1987.

II. Conclusions of Law

1. The Court has jurisdiction over Maness's Title VII claims.

2. The Court has pendent jurisdiction over Maness's claims under the Minnesota Human Rights Act ("MHRA").

3. The MHRA applies to the actions alleged to have been taken by the Matkov firm, Salzmann and Hult.

4. Maness's claims against the Matkov firm, Hult and Salzmann are not barred as untimely under the MHRA.

5. Maness can recover under Title VII for acts of retaliation or reprisal occurring before March 30, 1985 only if

such an act or acts occurred after March 30, 1985 and if the acts were part of a continuing violation.

6. Maness can recover under the MHRA for acts of reprisal and/or acts aiding and abetting a reprisal occurring before August 1, 1985 only if such an act occurred on or after August 1, 1985 and such acts were part of a continuing violation.

7. Under the analysis set forth in Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255 n.9, 101 S. Ct. 1089, 1094 n.9, 67 L.Ed.2d 207 (1981), Maness has proven a prima facie case of retaliation in Star-Kist's terminating him on August 1, 1985.

8. Star-Kist's proffered reason for terminating Maness is legitimate and non-discriminatory.

9. Under the analysis set forth in Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S. Ct. 1089, 1095, 67 L.Ed.2d 207 (1981), Maness failed to prove by direct or indirect evidence that Star-Kist's proffered reason for terminating him was pretextual.

10: Under a Burdine analysis for

purposes of his claim under the MHRA, Minn. Stat. § 363.03, subd. 7, Maness has proven a prima facie case of retaliation in Star-Kist's terminating him on August 1, 1985.

11. Star-Kist's proffered reason for terminating Maness is legitimate and non-discriminatory.

12. Under a Burdine analysis for purposes of his claim under the MHRA, Maness has failed to prove by direct or indirect evidence that Star-Kist's proffered reason for terminating him is pretextual.

13. Star-Kist and Heinz did not participate in any intentional or otherwise actionable reprisal or other discrimination against Maness in violation of Title VII, 42 U.S.C. §2000e-3 (1988) or the MHRA, Minn. Stat. § 363.03, subd. 7. (1985).

14. McCabe, Dierdorff and Burke did not participate in any intentional or otherwise actionable reprisal or other discrimination against Maness in violation of Title VII, 42 U.S.C. §2000e-3 (1988) or the MHRA, Minn. Stat. § 363.03, subd. 7. (1985), nor did the individual Star-Kist

defendants aid or abet any reprisal in violation of the MHRA. Minn. Stat. § 363.03, subd. 6.

15. The Matkov firm, Hult and Salzmann did not aid or abet any reprisal in violation of the MHRA. Minn. Stat. § 363.03, subd. 6.

16. Under the analysis set forth in the United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S. Ct. 1885, 1889, 52 L.Ed.2d 571 (1977), Maness has not proven that Star-Kist or the individual Star-Kist defendants committed a continuing violation in violation of Title VII or the MHRA.

ORDER FOR JUDGMENT

Plaintiff's complaint is DISMISSED WITH PREJUDICE. LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 11, 1992

ss/

Richard H. Kyle
United State District Judge

Memorandum

The events giving rise to this litigation revolve around Maness's involvement on behalf of Alice Ellenberg, a co-worker of Maness's at the Tuffy's plant in Perham, Minnesota. In 1981 and 1982, Ellenberg filed several charges of employment discrimination against Tuffy's and in 1983, Ellenberg filed a lawsuit against Tuffy's. Maness assisted Ellenberg's efforts at filing charges with the EEOC and provided letters to the EEOC as well as a statement to Ellenberg's attorney, Barbara Louisell.

In April 1983, Maness was transferred to the Star-Kist plant in Muscatine, Iowa. While in Muscatine, Maness had two meetings with counsel hired by Star-Kist to defend the Ellenberg litigation, including one with Keith Hult. Maness also voluntarily provided deposition

testimony in the Ellenberg litigation which was favorable to Alice Ellenberg. In September of 1984, attorney Keith Hult began to request that Maness meet with him regarding allegations that Maness had disclosed confidential information to Louisell. As a result of Hult's conduct at the previous meeting, viewed by Maness as overbearing and aggressive, Maness was unwilling to meet with Hult and retained attorney Charles Traw to represent him in dealings with Hult.

Hult continued to request a meeting with Maness. On July 22, 1985, Hult sent Traw a letter setting July 30, 1985, as the date by which he expected some response regarding a meeting. On July 31, 1985, Hult communicated to Star-Kist personnel that Maness had not responded to his letter. On August 1, 1985 Maness was terminated by Star-Kist, and a subsequent

request for reinstatement was refused. Maness filed employment discrimination charges against Star-Kist and its attorneys, eventually bringing this action against the named defendants.

I. Procedural Arguments for Judgment

A. Lawyers' Due Process Argument Against Applying MHRA

The Matkov firm, Salzmann and Hult (collectively the "lawyer defendants") argue that they are entitled to judgment because the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 6 ("MHRA") (1985), has no application to Maness's termination, which occurred in Iowa during a period when Maness was a resident of Iowa. As the lawyer defendants concede, this argument has been set afloat and sunk once before. This Court need not pass

again on the propriety of this argument.[6]

For the first time, the lawyer defendants also contend that "constitutional Due Process" precludes the MHRA from being applied to them.[7] The

---

[6]In her order dated December 31, 1990, the Honorable Diana E. Murphy ruled that the MHRA did apply to the facts of this case. Judge Murphy concluded that the language of Minn. Stat. § 363.03, subd. 7, which makes unlawful any conduct constituting a reprisal against any person for opposing a practice forbidden under the MHRA, or for testifying or participating in any manner in any proceeding under the MHRA, includes conduct that took place outside Minnesota.

In the same way, the lawyer defendants cannot avoid Minn. Stat. § 363.03, subd. 6. That provision of the MHRA prohibits any person from aiding, abetting, inciting, compelling or coercing a person to engage in any practice forbidden by the MHRA. To the extent that the lawyer defendants aided and abetted any violations of the MHRA by Star-Kist or its personnel, the lawyer defendants can be held accountable under the MHRA, whether the violation occurred in Minnesota or in some other state.

[7] The lawyer defendants do not identify the source of the constitutional due process that allegedly protects them. Nevertheless, this Court assumes that the

lawyer defendants argue that the State of Minnesota had insufficient contacts with the events giving rise to this litigation to allow this Court to apply the MHRA to this situation. The lawyer defendants further argue that although the Ellenberg litigation was pending in Minnesota and was governed by the MHRA, that litigation is in and of itself insufficient to permit extending the MHRA to the lawyer defendants' actions in this case.

In Allstate Ins. Co. v. Hague, 449 U.S. 302, 101 S. Ct. 633, 66 L.Ed.2d 521 (1981), the Supreme Court set forth the governing statement of law regarding the limitations that due process puts on a state applying its substantive law to the facts in a given case:

---

lawyer defendants are relying on the due process requirements made applicable to the States by the Fourteenth Amendment to the United States Constitution.

> [F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interest, such that choice of its law is neither arbitrary nor fundamentally unfair.

Id. at 312-13, 101 S. Ct. at 640. Subsequently, in McCluney v. Joseph Schlitz Brewing Co., 649 F.2d 578 (8th Cir.), aff'd mem. 454 U.S. 1071, 102 s. Ct. 624, 70 L.Ed.2d 607 (1981), reh'g denied, 455 U.S. 929, 102 S. Ct. 1295, 71 L.Ed.2d 473 (1982), the Eighth Circuit restated this rule: "a state whose law is chosen to control a case must have a substantial factual contract with the parties or the transaction giving rise to the litigation." Id. at 581. Due process limits a State's ability to apply its law, out of a regard for both fairness to parties and promoting healthier interstate

relations. Id. at 582. Where a State has significant contact with facts giving rise to litigation, however, no party may reasonably expect that the forum state's law cannot control the case. Id.

Due process does not preclude Maness's action against the lawyer defendants. In this case, Minnesota's connections with the events giving rise to this litigation are sufficient to satisfy due process.[8] First, Maness's claims of

---

[8]In addition, the lawyer defendants' sole legal authority for their argument, the Eighth Circuit's decision in McCluney, is inapposite to the lawyer defendants' argument. In McCluney, the plaintiff brought an action against the defendants for violation of a Missouri statute.

The court determined that the plaintiff's contacts with Missouri were insufficient to allow the court to apply Missouri's substantive law. The plaintiff established his home in Missouri after he was terminated; until that time, he had not had any contacts with Missouri for five years. In addition, none of the events on which the action was premised occurred in Missouri. Id. at 583. The court thus concluded that Missouri's only

retaliation and reprisal are grounded on his involvement in the Ellenberg litigation. The acts giving rise to the Ellenberg litigation occurred only in Minnesota and thus the MHRA could be applied to the Ellenberg litigation without offending due process. Second, many of Maness's actions on behalf of Ellenberg took place at the Perham, Minnesota plant. In other words, his "opposition to a practice forbidden" under the MHRA as well as his assistance and participation in a proceeding under the MHRA occurred in Minnesota. See Minn. Stat. § 363.03, subd. 7(1). Third, the

---

contact with the action was that the defendant moved to Missouri after he was terminated. Id. The Eighth Circuit held that standing alone a post-termination change of residence was insufficient to "allow Missouri law to affect a[n action that was wholly based in Wisconsin]. Neither party could reasonably expect that the Missouri [law] would [be applied to them]." Id. at 583-4.

lawyer defendants allegedly took steps to prevent Maness from participating in the Minnesota proceeding once he was transferred to Iowa and allegedly aided and abetted his termination after he persisted in maintaining his involvement with the proceedings under the MHRA.[9] Thus, when Minnesota's contacts with the factual record are examined, the lawyer defendants' claim that due process precludes this Court from applying the MHRA is without merit.

B. The Lawyer Defendants' Statute of Limitations Defense

The lawyer defendants also argue that all or almost all of Maness's claims are barred as untimely. They argue that under the version of the MHRA in existence in

---

[9] In fact, the circumstances surrounding Maness's deposition, which was taken in Minneapolis, is a central event in this litigation.

1985, claims of unlawful discrimination had to be brought within 300 days of the events giving rise to the claim of discrimination. The lawyer defendants argue that none of the acts of aiding and abetting reprisal allegedly committed by them occurred within 300 days of Maness filing his charge. (Lawyers Post-Trial Mem., at 3-4.)

The argument is without merit. The complaint against them alleges in part that the lawyer defendants aided and abetted the termination, which occurred on August 1, 1985, clearly within the 300-day period. Because the termination is the alleged reprisal that constitutes a violation of the MHRA, the cause of action against the lawyer defendants for aiding and abetting the termination could not have accrued until the date of the termination.

In addition, Maness claimed that Hult provided Leamy with a letter dated August 15, 1985, and that Leamy relied upon that letter in deciding not to reinstate Maness. Leamy's refusal to reinstate Maness occurred on or about August 22, 1985, a date within the 300 day period. If Leamy's refusal to reinstate Maness is a violation of the MHRA, the lawyer defendants aided and abetted that violation within 300 days of Maness filing a charge. Although some of the alleged acts of aiding and abetting are clearly outside the 300 day period, Maness's claims against the lawyer defendants are not barred en toto.

II. Maness's Claims Against All Defendants

A. Maness Must Rely on the August 1, 1985 Termination

Although Maness's claims against the

lawyer defendants are not untimely under the MHRA, Star-Kist, Heinz and the individual defendants (collectively the "corporate defendants") argue that Maness's cause of action is untimely because Maness did not prove that the corporate defendants violated either Title VII or the MHRA within the statute of limitation period governing each statute. (See Star-Kist Post-Trial Mem., at 21.) Both the MHRA and Title VII, as they existed in 1985, contained 300-day statutes of limitations. See Minn. Stat. § 363.03, subd. 3(1985); 42 U.S.C. § 2000e-5(e). Acts or events occurring outside that 300-day window are not actionable in and of themselves, although they may be considered as relevant evidence of discrimination in an action brought on a timely-filed charge. United Airlines, Inc. v. Evans, 431 U.S. 553,

558, 97 S. Ct. 1885, 1889, 52 L.Ed.2d 571 (1977) ("a discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed"). Accordingly, any acts of reprisal or acts aiding and abetting any reprisal which occurred before March 30, 1985 or August 1, 1985 are not actionable under Title VII and the MHRA, respectively.[10]

It is undisputed that almost all of Maness's claims are based on acts and events allegedly occurring prior to 1985. With respect to those claims, Maness did not file a timely charge/claim under

---

[10] Maness filed a charge with the Iowa Civil Rights Commission on January 24, 1986. For purposes of calculating the 300 day limit under Title VII, filing a charge with a state agency starts the 300 day clock. Maness filed a charge with the Minnesota Department of Human Rights on May 28, 1986.

either Title VII or the MHRA. Accordingly, Maness cannot recover for those acts simply by proving that the acts occurred. Rather, Maness must also establish that an act of retaliation or reprisal occurred on or after August 1, 1985 for his MHRA claims or occurred on or after March 30, 1985 for his Title VII claims.

If the evidence adduced at trial establishes a timely violation of either or both statutes, Maness could look to the "continuing violation" doctrine to establish liability for any act or event occurring before those dates. See Satz v. ITT Finan. Corp., 619 F.2d 738, 744 (8th Cir. 1980); Sigurdson v. Isanti County, 448 N.W.2d 62, 66-67 (Minn. 1989) (same under MHRA); Johnson v. Ramsey County, 424 N.W.2d 800, 810 (Minn. 1988) (same). If the evidence does not establish a timely

violation, Maness cannot gain redress for his untimely claims.[11]

B. Alleged Reprisal by the Corporate Defendants

Maness's Complaint alleged that the corporate defendants violated both Title VII, 42 U.S.C. § 2000e-3(a) and the MHRA, Minn. Stat. § 363.03, subd.7, by engaging in acts of reprisal or retaliation against him because of his actions on behalf of Alice Ellenberg in regards to her EEOC charges and subsequent litigation. Title VII provides:

> It shall be an unlawful employment practice for an

---

[11] Under Johnson v. Ramsey County, 424 N.W.2d 800 (Minn. 1988), a claim based on the continuing violation theory must be predicated on a violation occurring within the statutory limitations period. See Berry v. Board of Supervisors, 715 F.2d 971, 979 (5th Cir 1983) (holding the same under Title VII). Once a timely violation is established the analysis turns to whether a "continuing violation" exists. See Satz, 619 F.2d at 744

> employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C § 2000e-3(a).

The MHRA provides:

> It is a discriminatory practice for any employer . . . to intentionally engage in any reprisal against any person because that person: (1) has opposed a practice forbidden under this chapter or has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter; . .

Minn. Stat. § 363.03, subd.7(1).[12]

---

[12] A "reprisal" includes, but is not limited to any form of intimidation, retaliation, or harassment. Specific acts that constitute reprisal include departing from any customary employment practice and assigning a person a lesser position in terms of inter alia, employment status. Minn. Stat. § 363.03, subd.7. Intentionally terminating an employee because they engaged in protected activity

To determine retaliation under Title VII or the MHRA, courts look to the three part test common to Title VII cases.[13] See Jackson v. Missouri Pac. R.R. Co., 803 F.2d 401, 406-7 (8th Cir. 1986) (Title VII); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn. 1983) (MHRA). A plaintiff must first prove a prima facie case of retaliation. If a prima facie case is shown, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for

---

would be an unlawful reprisal.

[13] The 3-step test has its origins in McDonnell-Douglas v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The Minnesota Supreme Court approved the use of this test for MHRA cases in Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978). As a result, a single discussion will address Maness's claims against Star-Kist under both Title VII and the MHRA. Maness's claims against the individual defendants on grounds of aiding and abetting an unlawful reprisal or retaliation will be discussed separately.

its action. If the defendant meets this burden of production, the burden shifts back to the plaintiff to prove that the defendant's articulated reason is actually a pretext; the real motive for the action was retaliation for engaging in protected activity. See Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255 n.9, 101 S. Ct. 1089, 1094 n.9, 67 L.Ed.2d 207 (1981) (applying Title VII); Daines v. City of Mankato, 754 F. Supp. 681, 700 n.3 (D. Minn. 1990) (same); Hubbard, 330 N.W.2d at 444 (applying MHRA).

1. Step 1: Establishing a Prima Facie Case

Maness clearly established a prima facie case of retaliation. To establish a prima face case of retaliatory discharge or reprisal, a plaintiff must show: (1) statutorily protected conduct by the employee; (2) adverse employment action by

the employer; and (3) a causal connection between the two. Jackson, 803 F.2d at 406-7; Hubbard, 330 N.W.2d at 444-45. First, Maness established that he engaged in numerous acts protected under both Title VII and the MHRA.[14] Second, Star-Kist made an employment decision adverse to Maness: Maness was terminated by Star-Kist on August 1, 1985.

The corporate defendants contend that Maness did not establish the third element of a prima facie case: a causal connection between his protected activities and the termination. At a minimum, proving a causal connection

---

[14] For example, Maness wrote letters to the EEOC on behalf of Alice Ellenberg and gave deposition testimony in the Ellenberg litigation. Although Maness's protected activities were not close in time to the termination, that fact does not warrant a conclusion that Maness did not engage in protected activity.

required Maness to show that Star-Kist was aware of his statutorily protected activity. Wolff v. Berkley, Inc., 938 F.2d 100, 103 (8th Cir. 1991). Star-Kist knew about Maness giving deposition testimony in the Ellenberg litigation.[15] The defendants, however, argued that more than mere knowledge is required to establish a causal connection.

After a full trial on the merits, finding a causal connection will not unduly preoccupy this Court. The Court denied Star-Kist's motion for judgment at the close of plaintiff's case and the defendants put into evidence all of their proof as to the legitimacy of their

---

[15] Dierdorff and Burke knew that Maness had been deposed in September 1984. In addition, Hult's October 11, 1984 letter to Ciko stated that as a result of Maness's statements at his deposition, Hult was concerned that Maness may have divulged information protected by the attorney-client privilege.

actions. Accordingly, the Court's task is to determine the ultimate question whether there was a discriminatory reprisal or retaliation within the meaning of Title VII or the MHRA. See United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S. Ct.f 1478, 1481, 75 L.Ed.2d 403 (1983); Enstrom v. Beech Aircraft Corp., 712 F. Supp. 841, 849 (D. Kan. 1990) (quoting Aikens). Maness has established that Star-Kist was aware of his protected activity. In this case, that proof is sufficient to move the court to the ultimate question.

2. Step 2: Articulating a Legitimate Reason

Because Maness established a prima facie case of retaliation, the Court must determine whether the corporate defendants' stated reason for terminating Maness was pretextual or legitimate and

non-discriminatory. This task begins with the corporate defendants carrying the burden of production: they had to come forward and articulate a legitimate, non-discriminatory reason for Maness's discharge. Meeting this burden required the corporate defendants to produce some evidence supporting their stated reason for terminating Maness. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 255 n.9, 101 S. Ct. 1089, 1094 n.9, 67 L.Ed.2d 207 (1981); Rodriguez v. General Motors Corp., 904 F.2d 531, 533. It must be remembered that the corporate defendants only carried a burden of production. Maness's prima facie case was rebutted if the corporate defendants produced admissible evidence that would allow this Court as the trier of fact to conclude that the termination had not been motivated by "discriminatory animus." See

Burdine, 450 U.S. at 257, 101 S. Ct. at 1096.

The corporate defendants met their burden of production. The testimony and exhibits admitted at trial establish, and this Court finds, that Maness was terminated because Star-Kist believed that Maness had refused to meet with Star-Kist attorneys about a matter of great importance and that by doing so, he violated the duty that Star-Kist believed he owed as a supervisory employee. This reason is independent of Maness's involvement in the Ellenberg litigation and reflects an employer's ability to discharge an at-will employee for any non-discriminatory reason.[16]

---

[16] Cf. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101, n.1 (8th Cir. 1986). In Estes, the court noted the relationship between the defendant's burden to articulate a legitimate reason for the adverse employment decision and

First, evidence adduced at trial showed that the attorneys for Star-Kist desired to meet with Maness to discuss their concerns about possible breaches of the attorney-client privilege.[17] Hult

---

the plaintiff's burden to prove pretext. An employer may terminate an employee for any reason so long as it is not discriminatory. That fact, however, does not prevent a plaintiff from critically examining the proffered reason to determine its authenticity.

[17] Neither Hult or Salzmann specifically warned Maness that the meetings were to be kept confidential. Notwithstanding their failure to warn him of the attorney-client privilege, the privilege could still attach to some or all of the discussions during those meetings. See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (en banc); see also Upjohn Co. v. United States, 449 U.S. 383, 394-96, 101 S. Ct. 677, 685-87, 66 L.Ed.2d 584 (1981). Moreover, to the extent that portions of the meetings between Maness and Star-Kist lawyers were found to be within the privilege, Hult's role as Star-Kist's counsel gave him a legitimate interest in knowing whether and to what extent Maness divulged privileged information to Louisell. This interest is independent of any interest in controlling Maness's subsequent involvement in the Ellenberg

expressed his desire for a meeting directly to Maness on both August 28, 1984 and September 5, 1984.[18] Hult also communicated his desire for a meeting to Traw after Traw became Maness's lawyer.[19]

---

litigation.

[18] On September 5, 1984, Hult communicated his desire to Maness by telephone conversation and a subsequent letter. In his September 5, 1984 letter to Maness, Hult stated that he desired to meet with Maness regarding "certain allegations concerning your employment that have been attributed to you." (Plf's Exh. 18) After receiving these communications, Maness knew or should have known that Hult wanted a meeting to discuss certain allegations concerning Maness's conversations with Louisell. Although Hult's previous behavior made Maness unwilling to arrange a meeting, Hult's stated rationale for wanting a meeting was legitimate.

[19] After Maness secured Traw's services, Traw directed Hult to communicate only with him. Hult addressed the subject of a meeting between himself, Maness and Traw by separate letters to Traw dated September 12, 1984, June 20, 1985, and July 22, 1985. In the September 12, 1984 letter, Hult stated that Maness's "knowledge of the Ellenberg litigation was not to be the subject discussed." (Plf's

Finally, Hult's October 11, 1984 letter to Heinz counsel Ciko states that Hult wants to meet with Maness to determine the extent to which Maness potentially breached the attorney-client privilege. The letter does not set forth any other reason for a meeting.

Evidence adduced at trial also established that Maness did not accede to Hult's request to meet with him. Maness avoided agreeing to meet with Hult during phone calls on August 28 and September 5, 1984. In addition, he engaged Traw to protect him from Hult. Traw testified

---

Exh. 10) (emphasis supplied.) In the June 20, 1985 letter to Traw, Hult stated that he still desired a meeting to "interview [Maness] based on the allegation of Ellenberg's attorney that the attorney-client privilege had been breached." (Plf's Exh. 50.) The consistency of these statements supports the corporate defendants' contention that their reason for terminating Maness was non-discriminatory.

that he never took steps to arrange a meeting between himself, Maness and Hult. Whatever Traw's reasoning for not arranging a meeting, the evidence clearly established that no meeting ever occurred.[20]

The corporate defendants also established that Maness's failure to meet with Hult was the reason that he was terminated. Brain Leamy, the Star-Kist executive who ordered Maness's termination, testified that his decision to terminate Maness was based solely on

---

[20] Maness testified that he would have met with Traw had Traw directed him to do so. Traw, however, did not communicate this fact to Hult, nor did Traw ever attempt to ascertain exactly why Hult wanted to meet with Maness. Given Hult's position between Hult and Maness, Hult and the corporate defendants cannot be faulted for being unaware of Maness's willingness to arrange a meeting.

Hult's July 31, 1985 letter to Pridy.[21] In that letter, Hult stated the reasons for his desire to meet with Maness, the lack of a response from Maness and the potential damage accruing to Star-Kist as a result of Maness not agreeing to talk to Hult.[22] Hult had no other role in Leamy's decision to terminate Maness. In addition, the payroll notification documenting Maness's termination states that Maness's "involuntary" termination was based upon "breach of the attorney/client privilege on advice of

---

[21] Maness argues that Leamy's testimony at trial regarding the reasons for the termination was inconsistent with his deposition testimony. To the extent that there were inconsistencies, the court finds Leamy's trial testimony to be credible.

[22] Hult also included all correspondence with Traw, which as discussed supra, established that Hult wanted to meet with Maness only to discuss the attorney-client privilege.

attorney."[23] (Plf's Exh. 53.)

Finally, Leamy's decision not to reinstate Maness was based on Hult's August 15, 1985 letter reviewing the issues raised in Traw's August 1, 1985 letter seeking Maness's reinstatement. In his letter, Hult only addressed Maness's failure to meet with Hult. Maness's involvement in the Ellenberg litigation was not mentioned except as it regarded the potential breaches of the attorney-client privilege. Hult had no other role in Leamy's decision not to reinstate Maness.

In summary, the evidence adduced at trial clearly establishes that Star-Kist

---

[23] At trial, Leamy testified that although he initialed the notification form, implicitly approving of its contents, he now accepts the fact that the form incorrectly stated that Maness had breached the attorney-client privilege. Whether he had in fact done so was unknown.

met its burden of production to articulate a legitimate, non-discriminatory reason for Maness's termination. Once the corporate defendants met their burden of production, Maness could prevail only if he established that the reason offered by the corporate defendants is not the true reason for his termination. Maness retained the ultimate burden to persuade this Court that the corporate defendants intentionally discriminated against him. See Burdine, 450 U.W. at 253, 101 S. Ct. at 1093. The demand to show pretext may be accomplished either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id. 450 U.S. at 256, 101 S. Ct. at 1095; Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101 (8th

Cir. 1988).

3. Step 3: Establishing Pretext

Maness argues that circumstantial evidence adduced at trial shows that the corporate defendants' stated reason is pretextual. Toward that end, Maness introduced a wide variety of evidence, both by exhibit and testimony.[24] Maness first argues that the fact that he was

---

[24] As an initial matter, Maness's transfer to Muscatine and the circumstances surrounding it, although admissible as evidence of retaliation, are not probative of any retaliation or reprisal. Although he was notified of the opening by Tuffy's management and encouraged to apply for it, Maness was not ordered to apply or threatened with termination if he did not apply. In addition, Maness testified that he decided of his own accord to pursue the transfer and that no one from Tuffy's or Star-Kist headquarters attempted to influence his ultimate decision to accept Dierdorff's offer. Moreover, Burke and Dierdorff's credible testimony established that they had full control over the decision to hire Maness and that they hired him on the basis of merit.

never ordered to meet with Hult by anyone at Star-Kist shows that the proffered reason is not credible.

The lack of an order to meet with Hult does not discredit Star-Kist's proffered reason. Following Hult's September 5th conversation and follow-up letter stating a desire for a meeting, Maness hired Traw, who subsequently told Hult that all communications regarding the Ellenberg litigation were to come through him. From that point on, no one from Star-Kist could order Maness to meet with him and Hult had no power to issue such an order. Hult could only request a meeting through Traw.

Maness also argues that his prior cooperation with Star-Kist's lawyers is evidence of pretext. This evidence is also unavailing. On August 28 and September 5, 1984, Hult requested a

meeting with Maness, but Maness did not want to meet with Hult because of Hult's conduct at the meeting on or about July 29, 1984. Maness thus was at times willing and at other times unwilling to cooperate with Star-Kist's lawyers. Moreover, after September 7, 1984, Maness's willingness to meet is immaterial: Traw's unwillingness to arrange a meeting and statements that a meeting was unnecessary controlled Hult's and Star-Kist's perceptions.

Maness further argues that Hult's failure to pursue a meeting with Maness following his termination evidences pretext. This evidence does not assist Maness in establishing that Star-Kist's proffered reason was pretextual. After Maness was terminated and Leamy decided not to reinstate Maness, Hult and Star-Kist resolved to accept the fact that the

Ellenberg litigation would go forward without information from Maness. No evidence was introduced at trial that warrants this Court questioning the credibility of this aspect of Hult's testimony. Furthermore, Maness was terminated for not meeting with Star-Kist's lawyers. Accordingly, Hult's failure to pursue a meeting that he had requested several times does not point to pretext.

Maness also argues that Hult's failure to pursue meetings with other Tuffy's employees who spoke with Louisell supports a conclusion of pretext. Hult's failure to pursue meetings fails to indicate pretext for two reasons. First, there was no evidence to support a conclusion that the attorney-client privilege attached to discussions with other employees or that Hult believed it

attached. Hult testified that because the other employees were not supervisory-level employees, in his mind the attorney-client privilege could not attach to his meetings with them. Absent evidence that the information was potentially privileged, Hult's failure to follow-up with those witnesses is immaterial.

Second, there is nothing in the record indicating that Hult knew that other employees in fact made disclosures to Louisell about their discussions with Star-Kist's lawyers and that based on his knowledge of the interviews, their disclosures were potentially damaging. If there were no disclosures of material believed to be important, Hult's failure to follow-up is immaterial.

Maness also argues that the lack of an admitted author for the August 1, 1985 termination memorandum supports his

contention that the true motive behind the termination was retaliation. Hult testified that he did not write the August 1, 1985 termination memorandum, Leamy testified that he believed someone from Star-Kist industrial relations wrote the memorandum and Maness introduced Pridy's deposition testimony that she recalled that Hult wrote the memorandum.[25]

The lack of an admitted author is not probative of pretext. Regardless of who wrote the memorandum, the substance of the memorandum is consistent with Leamy's testimony that he decided to terminate Maness because he did not agree to meet with Star-Kist lawyers, as Leamy believed his duty as a supervisory employee of

---

[25] Pridy did not state that she knew Hult was the author, only that she "recalled" that he was. In addition, Pridy testified that she was uninvolved in the events surrounding Maness's termination. (Plf's Exh. 202, at 71.)

Star-Kist required him to do. Because Leamy made the decision to terminate Maness, the only evidentiary value of the memorandum is whether the language of the memorandum supports or contradicts Leamy's stated reason for terminating Maness. Here, the memorandum supports Leamy's credible testimony that Maness was not terminated because of his involvement with the Ellenberg litigation.[26]

Maness also argues that testimony

---

[26] This Court reaches the same conclusion with regard to Maness's evidence that Hult's July 31, 1985 letter was sent by overnight express mail and that the termination memorandum was faxed to Ray McCabe in Muscatine. Once the July 30, 1985 deadline was reached, there was no reason for Hult to delay telling Star-Kist that Traw had not responded. In the same way, once Leamy decided to terminate Maness, there was no reason to wait to communicate that fact to Maness through McCabe, a corporate officer. Maness's assertion that Star-Kist was motivated to act out of a concern that Maness would agree to meet is unsupported by the evidence.

from other Tuffy's employees supports a conclusion that Star-Kist's proffered reason is not credible. The employee-witnesses were Tuffy's employees who were interviewed by Hult at the Tuffy's plant in Perham. Their testimony established that Hult was overbearing and failed to treat them with the respect they deserved. This may reflect adversely on Hult's conduct as a lawyer, but it does not lead this Court to a conclusion of pretext.

Contrary to Maness's assertion, however, none of the testimony supports a conclusion that Maness's termination was a reprisal. Lorraine Petron did not testify that Hult intimidated and threatened her. Petron testified that she felt that Hult was trying to intimidate her and to control her statement and that she told Hult as much. Importantly, Petron testified that Hult did not attempt

to link her job status to her support of Alice Ellenberg, Hult did not tell her that she could not testify, Hult did not tell her that she had to clear any written statement with him and most importantly, Petron testified that her support of Alice Ellenberg never resulted in any adverse decision regarding her employment.[27]

---

[27] In her testimony, Clarice Gundersen testified that Hult was never intimidating nor rude to her. She did testify that Hult asked her to sign a statement without giving her the opportunity to read the statement. As a whole, however, neither Petron's nor Gundersen's testimony establishes that other employees were treated in a hostile manner. Nor does the evidence regarding the climate at the Tuffy's plant after Ellenberg was terminated support a conclusion that the corporate defendants retaliated against employees who engaged in protected activity. Finally, the adverse changes Maness experienced in his working conditions at Tuffy's likely were tied to his support of Alice Ellenberg. That treatment, however, is not actionable in and of itself. See supra Part I.A. Although it is relevant background evidence, it does not warrant a conclusion that Maness was terminated three years later in retaliation for his involvement

In summary, Maness's evidence, when taken as a whole does not present sufficient circumstantial evidence to support a conclusion that Star-Kist's proffered reason for terminating Maness is not credible and thus was pretextual. The testimony did establish that Maness was initially cooperative with Star-Kist's attorneys, but then he became uncooperative when he believed that he was being treated improperly. Maness did not, however, contest the validity of Leamy's belief that Maness had a duty to cooperate with Hult. Although Hult may have been less than complete in his disclosures to Leamy, there is no evidence that he deliberately misled Leamy because he wanted Maness to be terminated because of

---

in the Ellenberg litigation.

his deposition testimony.[28]

Moreover, Maness can cite no evidentiary or legal basis for his argument that Star-Kist "knew or should have known and recognized" the "errors and lies" in Hult's correspondence. Hult was the only person who had day-to-day contact with the Ellenberg litigation and no one at Star-Kist had the degree of knowledge Hult did about his attempts to meet with Maness.[29] Under such conditions, Leamy's

---

[28] Hult testified at trial that Maness was not an important witness in the Ellenberg litigation and that his unimportance militated against a conclusion that he was fired in retaliation for his testimony. This testimony is somewhat contradicted by Hult's statements in his October 11, 1984 letter to Ciko and his July 31, 1985 letter to Pridy. In both those letters, Hult emphasizes the damage that Maness could have done to Star-Kist if he disclosed the contents of the meetings between Maness and Star-Kist's lawyers.

[29] Maness did not introduce any evidence that would indicate that Leamy knew the scope of the attorney-client

reliance on Hult's information was reasonable and thus does not support a finding of pretext.[30]

Moreover, Maness's attempt to rely on Tretter v. Liquipak Intern., Inc., 356 N.W.2d 713 (Minn. Ct. App. 1984), is misplaced. In Tretter, the Minnesota Court of Appeals addressed the causal connection factor that is part of a plaintiff's prima facie case of

---

privilege or that he knew that a large portion of Maness's deposition was held not to be privileged. Neither did Maness impeach Leamy's credible testimony that he based his decisions on his own beliefs, as informed by Hult's letters and that his decision to terminate Maness had nothing to do with Maness's support of Alice Ellenberg.

[30] Because this Court has concluded that no violation of either Title VII or the MHRA occurred within 300 days of Maness filing a claim under the statutes, the Court need not and does not decide whether acts not occurring within 300 days of Maness filing his claims are nonetheless actionable under a "continuing violation" theory.

retaliation, id. at 715, not the other steps in analyzing claims of retaliation. In addition, the court did not "identify" any factors that courts should look to in assessing pretext under the MHRA. Finally, the court did not specifically discuss "uniqueness of treatment of the plaintiff" or "subsequent events corroborating or undermining" a defendant's articulated reasons for its adverse action.

C. Maness's Claims Against McCabe, Dierdorff and Burke

Similarly, Maness did not establish that McCabe, Dierdorff, or Burke[31] engaged in any acts of retaliation actionable under either Title VII or the

---

[31] As noted in the Court's Findings of Fact, Maness voluntarily dismissed his claims against defendant Burke at the conclusion of the case.

MHRA.[32] None of the individual defendants made the decision to terminate Maness, nor did they make the decision to not reinstate him. The sole role the individual defendants played was to follow Leamy's directive to read Maness the termination memorandum. This conduct is not actionable under either statute.[33]

II. The Lawyer Defendants

Maness's only claims against the lawyer defendants are that they aided and

---

[32] As discussed supra, at Part I.A., Maness had to establish that some act of retaliation or reprisal occurred on or after March 30, 1985 for purposes of Title VII and on or after August 1, 1985 for purposes of the MHRA. Thus, Maness had to show that the individual defendants either committed an act of retaliation or reprisal on or after those dates or for purposes of the MHRA only, that they aided and abetted such a reprisal by Star-Kist.

[33] Because this Court has determined that Star-Kist did not engage in any unlawful reprisal or retaliation, Maness's claims against McCabe, Dierdorff and Burke for aiding and abetting a violation of the MHRA cannot stand.

abetted the corporate defendants' acts in violation of the MHRA. Aiding and abetting violations of the MHRA is itself a violation of the statute. See Minn. Stat. § 363.03, subd. 6. Individuals and associations may be liable for aiding and abetting a violation even if they are not an employer.

This Court has determined that on the evidence adduced at trial, none of the corporate defendants engaged in retaliation or reprisal that was unlawful under the MHRA. See supra, Part I.A. Accordingly, the lawyer defendants cannot be found to have aided and abetted any violation.[34]

---

[34] This Court has no difficulty concluding that Hult's behavior towards Maness and other employees, although not unlawful, was unwarranted and inappropriate. A lawyer's duty is to vigorously defend his client's interests and achieve the best possible outcome for the client. As the evidence showed and as Judge Murphy found in her June 5, 1985 order, however, (Plf's Exh. 38), much of

This Memorandum is hereby incorporated into and made a part of the Court's Findings of Fact and Conclusions of Law.[35]

R.H.K.

Hult's interactions with Maness and other witnesses "sought to ascertain, discuss and direct [their] conduct as witnesses." Id. at 12. This sort of behavior is not warranted under a lawyer's duty as an advocate, nor is it likely to further the search for truth. Moreover, the only result likely to emanate from such conduct is a perception that lawyers seek only to obfuscate the truth and that honesty has a limited role in the judicial process. Although not necessary to the decision in this case, it must be noted that Hult's behavior and conduct was more than matched by similar conduct on the part of Ms. Louisell. It seems clear that much of the animosity towards, and distrust of, the lawyers in this and the Ellenberg litigation can be traced to the acrimonious relationship between Hult and Louisell.

[35] On June 23, 1992, this Court ordered that the trial be bifurcated into a liability phase and a damages phase. Having determined that none of the defendants violated either Title VII or the MHRA, there is no need for this Court to pass on what damages, if any, would be appropriate.

Supreme Court, U.S.
FILED
MAY 19 1994
OFFICE OF THE CLERK

No. 93-1691

In The

Supreme Court of the United States

October Term, 1993

MONROE MANESS,

Petitioner,

v.

STAR-KIST FOODS, INC.; H.J. HEINZ COMPANY, INC.; MATKOV, GRIFFIN, PARSONS, SALZMAN & MADOFF; KEITH C. HULT; JAMES J. SALZMAN; RAY McCABE; ALAN D. DIERDORFF; and LARRY BURKE,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS STAR-KIST FOODS, INC.; H.J. HEINZ COMPANY, INC.; RAY McCABE; ALAN D. DIERDORFF; and LARRY BURKE

EDWARD M. LAINE
(Counsel of Record)
CAROL A. ELLINGSON
OPPENHEIMER WOLFF & DONNELLY
1700 First Bank Building
Saint Paul, MN 55101
(612) 223-2500
Counsel for Respondents Star-Kist Foods, Inc.; H.J. Heinz Company, Inc.; Ray McCabe; Alan D. Dierdorff; and Larry Burke

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE DECISION OF THE COURT OF APPEALS DOES NOT DIMINISH THE RIGHT OF AN EMPLOYEE TO ENGAGE IN ACTIVITY PROTECTED UNDER TITLE VII FREE FROM RETALIATION 4

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER RETALIATORY ANIMUS OF AN OUTSIDE TRIAL ATTORNEY CAN BE IMPUTED TO THE ATTORNEY'S CLIENT ... 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Anderson v. City of Bessemer, 470 U.S. 564 (1984) 6

Benson v. Little Rock Hilton Inn, 742 F.2d 414 (8th Cir. 1984) 7

Davis v. Lambert of Arkansas, Inc., 781 F.2d 658 (8th Cir. 1986) 7

Jackson v. St. Joseph State Hospital, 840 F.2d 1387 (8th Cir. 1988), *cert. denied*, 488 U.S. 892 (1988) 7

Johnston v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989) 7

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 6

St. Mary's Honor Center v. Hicks, ___ U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993) 5

Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981) 7

STATUTES

Minn. Stat. § 363.03, subd. 7 (1985) 2

Title VII, 42 U.S.C. § 2000e-3(a) (1988) 2

MISCELLANEOUS

Fed. R. Civ. P. 52(a) 6

No. 93-1691

In The

Supreme Court of the United States

October Term, 1993

MONROE MANESS,

Petitioner,

v.

STAR-KIST FOODS, INC.; H.J. HEINZ COMPANY, INC.; MATKOV, GRIFFIN, PARSONS, SALZMAN & MADOFF; KEITH C. HULT; JAMES J. SALZMAN; RAY McCABE; ALAN D. DIERDORFF; and LARRY BURKE,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS STAR-KIST FOODS, INC.; H.J. HEINZ COMPANY, INC.; RAY McCABE; ALAN D. DIERDORFF; and LARRY BURKE

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Eighth Circuit in this case.

STATEMENT OF THE CASE

For approximately one year, petitioner, Monroe Maness, and his attorney ignored repeated verbal and written requests made by outside trial counsel for respondent Star-Kist Foods, Inc. ("Star-Kist") that petitioner participate in a meeting, at which petitioner's attorney would be welcome, to discuss concerns that petitioner had revealed privileged communications to a party adverse to Star-Kist in a Title VII suit (hereinafter the "Ellenberg case"). Petitioner was not a party in the Ellenberg case. Through discovery and pretrial rulings it had become apparent that privileged information had been revealed by petitioner, and Star-Kist's attorneys sought a meeting with petitioner to determine the extent to which privileged information had been divulged. Ultimately, after many attempts to arrange a meeting were ignored, Star-Kist terminated petitioner's employment. Petitioner commenced an action against Star-Kist and others, including its outside trial counsel, alleging, *inter alia*, retaliation in violation of Title VII, 42 U.S.C. § 2000e-3(a) (1988) and the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7 (1985). After a nine-day bench trial, the District Court entered judgment for all defendants on petitioner's retaliation claims. The District Court found: (1) that petitioner made a *prima facie* case of retaliatory discharge; (2) that Star-Kist established a legitimate and non-discriminatory reason for the discharge; and (3) that petitioner failed to establish pretext. The District Court also found that neither Star-Kist nor its employees participated in any reprisal or discrimination and found that outside trial counsel did not aid or abet any reprisal. Petitioner appealed the District Court's finding of a non-

retaliatory reason for his discharge and also the dismissal of a common law claim for tortious interference with contractual relations. The Court of Appeals for the Eighth Circuit affirmed and a Petition for Rehearing and Suggestion for Rehearing En Banc was denied.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied because each of the two issues petitioner has framed for review are predicated upon factual assertions that are contrary to the factual findings made by the District Court following a bench trial. Petitioner has, with respect to both issues he presents, substituted his own inferences and arguments about the facts for the District Court's findings. In that regard, petitioner's first issue assumes that his employment was terminated because of his protected activity, and petitioner's second issue assumes that Star-Kist's trial counsel in the Ellenberg case caused petitioner's termination out of retaliatory animus. However, the District Court unequivocally found that the termination of petitioner was independent of petitioner's involvement in any protected activity and was also nonretaliatory. The District Court further found that there was neither any retaliatory animus nor any attempt by the trial attorney to mislead Star-Kist with respect to the decision to terminate petitioner's employment. As petitioner has not, and indeed cannot, challenge the District Court's findings as clearly erroneous, the questions petitioner has framed for review are without foundation in the record.

In addition, with respect to the first issue presented for review by petitioner, petitioner has articulated an erroneous test with respect to proving causation in a retaliation case. In that regard, petitioner relies upon an attenuated "but for" test that would, if adopted, prevent trial courts from determining as a matter of fact, whether an adverse employment decision was independent of participation in protected activity. Petitioner's misstatement of the law with respect to the test for causation constitutes an additional basis for denying the Writ.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT DIMINISH THE RIGHT OF AN EMPLOYEE TO ENGAGE IN ACTIVITY PROTECTED UNDER TITLE VII FREE FROM RETALIATION.

Petitioner suggests as his first issue that the decision of the Court of Appeals weakens the right of an employee to engage in protected activity and consult with counsel.[1] However, the instant case fails to present the issue framed by petitioner for two reasons. First, the District Court found as a matter of fact, based upon evidence in the record, that the decision to terminate petitioner was independent of petitioner's protected activity and was

[1] While the facts pertaining to communications involving petitioner's counsel were fully developed at trial, the decisions of the District Court and Court of Appeals reveal that a separate "right to counsel" argument is being raised for the first time in this Court.

not retaliatory. Second, petitioner has advocated a facile test for proving causation in a retaliation case that does not comport with applicable law.

The pivotal fact issue at trial was whether petitioner was terminated because he refused to meet with and provide information to Star-Kist attorneys with respect to a concern that petitioner had revealed privileged communications or whether the termination was retaliation for petitioner's willingness to provide unfavorable testimony in the Ellenberg case. The District Court unequivocally found that Star-Kist did not retaliate or discriminate and that petitioner was terminated because he refused repeated requests to participate in a meeting on matters independent of protected activity. (A[2] 73.) This finding on the "ultimate issue," *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S. Ct. 2742, 125 L.Ed.2d 407 (1993), was based upon the District Court's thorough analysis and evaluation of the evidence. Significantly, while not mentioned in the Petition, the District Court itemized evidence showing at least eight verbal or written requests to petitioner, spanning from August 28, 1984 to July 22, 1985, for a meeting. (A 38-44, Findings 37-41, 47-50.) The District Court further found facts supporting a concern that privileged information had been revealed, A 40-42, Findings 42-45, and that the stated rationale for the meeting was both legitimate and consistent. (A 74-76.) Finally, after listening to Star-Kist's key decisionmaker with respect to the termination, the District Court made a credibility finding in favor of Star-Kist. (A 78, 87.)

---

[2] As used herein, "A" shall refer to the Appendix contained in the Petition for Writ of Certiorari.

The District Court's factual findings were properly affirmed by the Court of Appeals under the clearly erroneous standard. Fed. R. Civ. P. 52(a) provides, in pertinent part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

It is well established that a finding is clearly erroneous only when the reviewing court is left with the definite and firm conviction that a mistake has been made, and the standard does not entitle a reviewing court to reverse simply because it is convinced it would have decided the facts differently. *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1984). Of course, the clearly erroneous standard is applicable to factual findings in Title VII cases. *Anderson, supra; Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Petitioner has not, and indeed cannot, persuasively argue that the record permits a reversal under the clearly erroneous standard. Thus, given the finding that petitioner's termination was non-retaliatory and independent of protected activity, it is clear that the instant case does not present the issue petitioner purports to frame for review.

In addition to ignoring the factual findings of the District Court, petitioner has also predicated his argument upon an erroneous characterization of the test to prove causation in a retaliation case. Specifically, although petitioner has utilized the "but for" language found in the case law, he utilizes it in a fashion that is both superficial and erroneous. Indeed, petitioner essentially advocates a rule that would deprive trial courts

from actually determining causation-in-fact in favor of a rule that would automatically entitle a retaliation plaintiff to summary judgment in his or her favor on the most attenuated of circumstances. In the instant case, petitioner argues that "but for" his protected activity, Star-Kist's attorney would not have requested a meeting and petitioner would not have been terminated for failure to attend a meeting. If the "but for" test is as petitioner describes, there would have been no need for a trial.

However, while some cases use the term "but for" interchangeably with causation-in-fact, *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1572 (5th Cir. 1989) (cited by petitioner), causation-in-fact requires an inquiry as to whether the stated reason for terminating an employee is independent of the employee's exercise of protected rights. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 418 (8th Cir. 1984); *Womack v. Munson*, 619 F.2d 1292, 1297 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981). Indeed, petitioner ignores substantial case law that would have been decided differently if petitioner's "but for" test were the rule. *See, e.g., Benson, supra; Jackson v. St. Joseph State Hospital*, 840 F.2d 1387 (8th Cir. 1988), *cert. denied*, 488 U.S. 892 (1988); *Davis v. Lambert of Arkansas, Inc.*, 781 F.2d 658 (8th Cir. 1986). Clearly, it is only through a misapplication of the test for causation that petitioner can suggest that the decision of the Court of Appeals in the instant case diminishes the right to engage in protected activity. However, the Court of Appeals properly affirmed findings of the District Court that the termination was factually independent of protected activity. Thus, there is no significant issue worthy of further review.

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER RETALIATORY ANIMUS OF AN OUTSIDE TRIAL ATTORNEY CAN BE IMPUTED TO THE ATTORNEY'S CLIENT.

In framing his second issue, petitioner has once again substituted his argumentative inferences for the District Court's factual findings. Specifically, petitioner suggests that the instant case raises the question of whether the retaliatory animus of an outside trial attorney should be imputed to the attorney's client. However, the District Court rejected petitioner's suggested inference that outside trial counsel was guilty of retaliatory animus and specifically found to the contrary. Since petitioner does not and cannot persuasively argue that the District Court's findings are clearly erroneous, the issue petitioner has attempted to raise is without foundation. In other words, to borrow from petitioner's analogy, Star-Kist's manager who made the termination decision could not have been the "cat's paw" if Star-Kist's outside trial counsel was not proven to be the cat.

Dispositive is the District Court's finding that " . . . there is no evidence that [the attorney] deliberately misled [the Star-Kist decisionmaker] because [the attorney] wanted Maness to be terminated because of his deposition testimony." (A 90-91.) The District Court had the opportunity to evaluate the attorney's testimony and also had before it all correspondence authored by the attorney. In that regard, Star-Kist waived its attorney-client privilege as to all communications bearing upon the termination of petitioner. Based upon all of the evidence, the District Court made related findings that the

attorney's stated rationale for the meeting was both legitimate and consistent. (A 74-76.) The legitimacy of the attorney's concern that privileged information had been revealed was based upon statements made by opposing counsel in the Ellenberg case, some of which were made in court and transcribed, as well as petitioner's deposition testimony in the Ellenberg case and subsequent rulings thereon. (A 41-42, Findings 44-45.) Thus, in light of the District Court's findings, which petitioner does not and cannot challenge as being clearly erroneous, the question of whether retaliatory animus of an outside trial attorney can be imputed to the attorney's client is not presented on the record of the instant case.

CONCLUSION

In light of the foregoing, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Dated: May 19, 1994.

Respectfully submitted,

EDWARD M. LAINE
(Counsel of Record)
CAROL A. ELLINGSON
OPPENHEIMER WOLFF & DONNELLY
1700 First Bank Building
Saint Paul, MN 55101
(612) 223-2500
Counsel for Respondents
Star-Kist Foods, Inc.;
H.J. Heinz Company, Inc.;
Ray McCabe; Alan D. Dierdorff;
and Larry Burke